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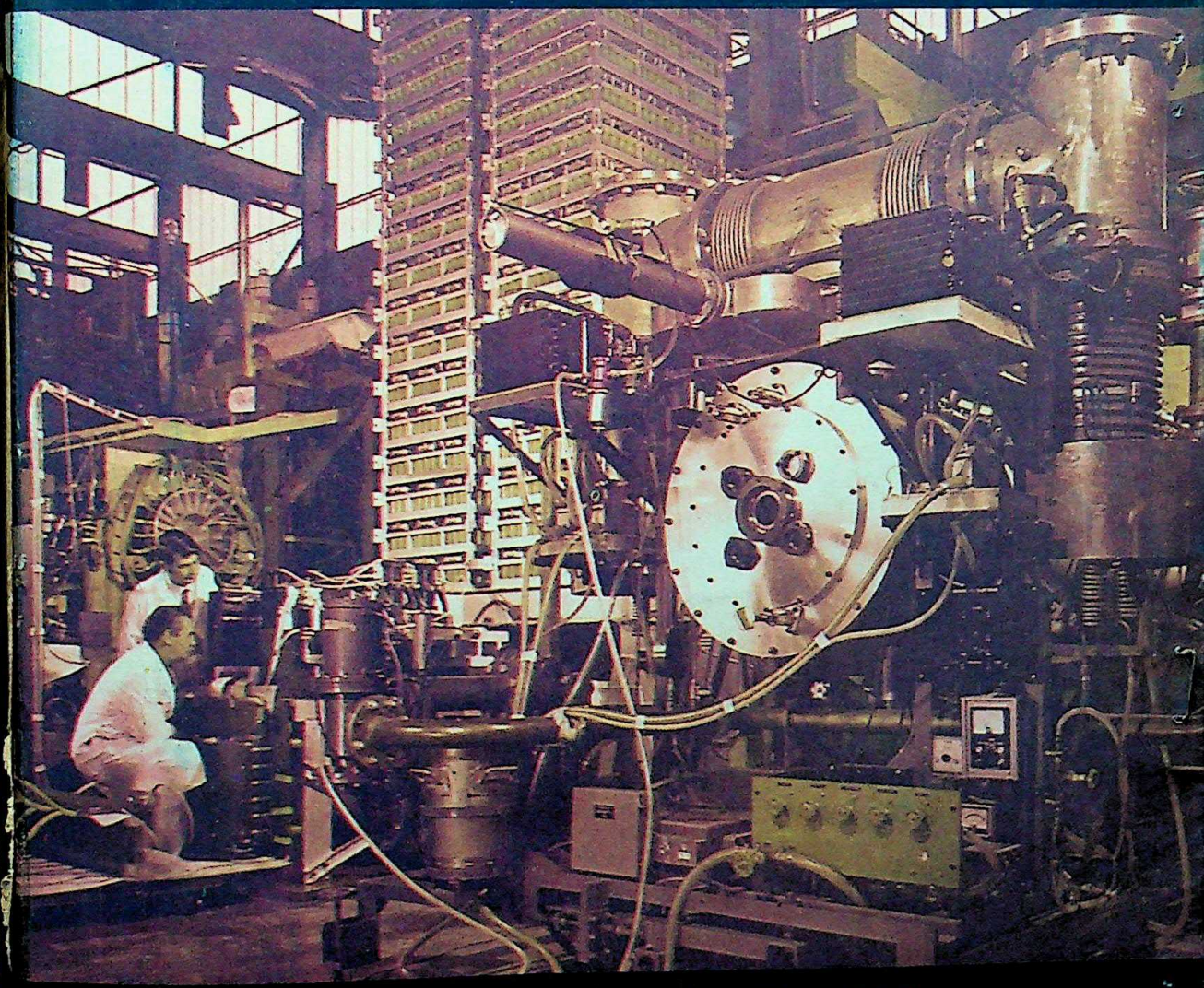
S.N.MISRA

LABOUR AND INDUSTRIAL LAWS



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AN INTRODUCTION TO
LABOUR AND INDUSTRIAL LAWS

By
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PREFACE TO THE SEVENTEENTH EDITION

Industry plays a vital role in building the economic structure of a society. Therefore, the importance of labour and industrial laws in shaping the economy of a country cannot be ignored. We, in our country, are mainly embarking upon the industrial and technological advancement but mere technological advancement is likely to widen the social imbalance for the knowledge of social sciences is equally important in regulating social relationship. As we know industrial jurisprudence is half law and half sociology, economics and politics. It is both economic and social justice which we cherish in our Constitution. Therefore, the minimum that we must secure to our people is freedom from want and security against economic fear. The importance of social security and economic social and cultural rights indispensable for the dignity and free development of personality of every member of the society has been recognised by the Universal Declaration of Human Rights. The post-independence era has witnessed some important developments in the field of labour and industrial laws. But as we know, social engineering is a continuing process which goes on with the pace of time, and here lies the importance of the study of industrial jurisprudence.

The field of industrial laws covers a large number of enactments. There is no single Labour Code in our country. We have different statutes dealing with different branches of labour and industrial laws. The present work deals with eighteen such enactments. Many Acts which were not included in the first edition have been included in subsequent editions of the book with a view to cover up not only the syllabi of various Law Faculties of the country, but to make the work useful even to those preparing for Company Secretaries and Chartered Accountants. The Trade Union Leaders, Labour and Industrial Relations Officers, researchers, and many others interested in the knowledge of labour management relations would find the work equally useful.

There have been demands for the last few years from many readers for inclusion of a few more important labour legislations. Therefore in the edition three last enactments namely, the Child Labour (Prohibition and Regulation) Act, 1986, the Contract Labour (Regulation and Abolition) Act, 1970 and the Equal Remuneration Act, 1976 have been included. We are sure that with these additions the book will now prove to be much more useful to those preparing for Business Administration courses and those doing specialisation in labour laws. Every care has been taken to incorporate all amendments made in various enactments till November, 1998. All important judicial decisions reported in the All India Reporter have also been included and in the process certain portions have been recast and rearranged.

Our special thanks are due to Prof. Veer Singh Chairman Law Department, Punjab University, Chandigarh, Prof. Anirudh Prasad, Dean, Faculty of Law, Gorakhpur University and Prof. (Dr.) S.C. Srivastava former Joint Secretary, Law Commission, New Delhi and now Professor Kurukshetra University for the support and encouragement they have given in popularising the book. We are thankful to our friends Professor (Dr.) J.N. Pandey, Ex-Dean, Faculty of Law, University of Allahabad, and Sri D.N. Pandey Lecturer, Faculty of Law, University of Allahabad for their suggestions and active help in adding the qualitative content of this edition. We also express our gratitude to all those

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friends and readers who have pointed out to the deficiencies in the book and have made their valuable suggestions for improvement and arrangement of the study material which we are sure, will definitely add to the usefulness of the work. Any such useful suggestions will be gratefully honoured in future also.

We have great pleasure in placing the Seventeenth Edition of the Labour and Industrial Laws in the hands of our inquisitive readers and we hope, with the addition of three important enactments, up-to-date case laws and amendments, they would find the material more useful.

We also thank Sri. R.N. Arora, the proprietor of Central Law Publications, Allahabad for bringing out the present edition with fine printing and get-up. We shall be failing in our duty if we don't express our gratitude to M/s. Universal Book Traders, Delhi, for all the pains that they have been taking in encouraging the circulation of the book.

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GENERAL INTRODUCTION

INDUSTRIAL JURISPRUDENCE

During the twentieth century a new branch of jurisprudence known as Industrial Jurisprudence has developed in our country. Industrial jurisprudence, is a development of mainly post-independence period although its birth may be traced back to the industrial revolution. Before independence it existed in a rudimentary form in our country. The growth of industrial jurisprudence can significantly be noticed not only from increase in labour and industrial legislations but also from a large number of industrial law matters decided by the Supreme Court and High Courts. It affects directly a considerable population of our country consisting of industrialists, workmen and their families. Those who are affected indirectly constitute a still larger bulk of the country's population. This branch of law modified the traditional law relating to master and servant and had cut down the old theory of *laissez faire* based upon the 'freedom of contract' in the larger interest of the society because that theory was found wanting for the development of harmonious and amicable relations between the employers and employees. Individual contracts have been in many respects substituted by a standard form of statutory contract through legislation and judicial interpretation. The traditional right of an employer to hire and fire his workmen at his will has been subjected to many restraints. Industrial Tribunals can by their award make a contract which is binding on both the parties creating new right and imposing new obligations arising out of the award. There is no question of the employer agreeing to the new contract, it is binding even though it is unacceptable to him. The creation of new obligations is not by the parties themselves. Either or both of them may be opposed to it, nevertheless it binds them. Thus, the idea of some authority making a contract for the workmen and employer is a strange and novel idea and is foreign to the basic principle of the law of contract.[1]

Similarly there is change in the concept of master and servant. One who invests capital is no more a master and one who puts in labour is no more a servant. They are employer and employees, the former may hire the latter but he can no more fire them at his will. The interest of the employees is in many respects protected by legislation. Both are now parties in an enterprise, without one yielding to the higher status of another but as co-sharer in the partnership. Even the right of labour participation in the management has been given legislative recognition to the utter despair of the capitalist. Most of the benefits claimed by a workman are not part of his bargain with the employer when the latter employed him or are not due to them on account of any contract but of "status". The industrial society all over the world has been moving during the present century from contract to status[2] and this status is a politico-socio-economic juristic status.[3]

What were the factors that lead to this departure from the old theories of the law of contract, and the law of Master and Servant ? Industrialisation in India, as in other

1. ".....Industrial arbitration may involve the extension of an existing agreement or the making of a new one, or in general the creation of new obligations, or modification of old ones....." Ludwig Teller, Labour Disputes and Collective Bargaining, Vol. I. p. 536.
2. According to Sir Henry Maine 'the human society has hitherto moved from status to contract'.
3. Mahesh Chandra, Industrial Jurisprudence (1976), p. 40.

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countries, brought with it some new socio-economic problems. Those who control the industry have a natural tendency of multiplying their wealth and if this tendency is not checked the rich grows on richer and the poor becomes poorer day by day. The gap between the rich and the poor ultimately grows on to this extent that it develops into two distinct classes in any industrial society, a few of whom are 'Haves' and others are 'Have-nots'. This economic disparity leads to a struggle between 'Haves' and 'Have-nots', the latter exploited. Although this situation continues for some time and it had continued to be so in our country too, but gradually the workmen realised that they could put a better fight if they get united. This realisation was closely followed by a period of industrial unrest leading to strikes and lock-outs. In conditions so disturbed the world has witnessed the horrors of the two world wars resulting in spiral rise in the cost of living. With the rise in the cost of living there has been consistent demand from labour for increase in wages. Democratic ideas have also grown simultaneously with the growth of industrialisation in our country. These democratic ideas have pleaded for and have also helped in mass awakening and consciousness for greater power amongst the working class. Out of the struggle between workers, demanding for better share in the production and profit of the industry and the employers' hesitation to part with it beyond a certain limit, have grown the recognition of certain principles which are considered to be fundamental in almost all developed countries of the world. The basic principles are :

(1) The right of workmen to combine and form associations or unions.
(2) The right of workmen to bargain collectively for the betterment of their conditions of service.
(3) The realisation that economic struggle is inevitable because it is but natural that labour would agitate for better conditions.
(4) A shift from the doctrine of "*laissez faire*" to a "*welfare state*".
(5) Tripartite consultations *i.e.*, solution of the industrial or labour disputes through the participation of workers, employers and the Government.
(6) The State can no more be a neutral onlooker but must interfere as the protector of the social good.
(7) Minimum standards must be guaranteed through State legislation.

The concept of industrial jurisprudence in our country developed only after independence. Until independence the change in attitude of the government and the benevolent labour legislation only aimed at amelioration of the conditions of labour and it could hardly be said to be a deal in social justice to the working class.[1] The birth of industrial jurisprudence in our country may be ascribed to the Constitution of India[2] which made more articulate and clear the industrial relations philosophy of the Republic of India. This philosophy has afforded the broad and clear guidelines for the development of our industrial jurisprudence and has thus taken India one step forward in her quest for industrial harmony.[3] The Parliament and the Supreme Court have helped in shaping industrial jurisprudence, the former through legislation and the latter as interpreter of the labour laws.

Industrial jurisprudence is of great importance to all developed or developing countries of the world because it is concerned with the study of problems relating to human relations arising out of a large scale development of factory system which has emerged in consequence of industrial revolution. Proper regulation of employer-employee relationship is a condition precedent for planned, progressive and

1. Mahesh Chandra, Industrial Jurisprudence (1976), p. 31.
2. In this connection the Preamble to the Constitution and Part III and Part IV of the Constitution dealing with Fundamental Rights and the Directive Principles of State Policy respectively need special mention.
3. Report of the National Commission on Labour (1969), p. 56.

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purposeful development of any society. As an instrument of social policy in the present day body-politic the role of industrial jurisprudence has still gained importance.[1] Industrial workers and their families are directly concerned with it.

In spite of its widening scope it cannot be forgotten that its application is limited in certain respects. For example, there are still a vast majority of the people who in their relationship are still governed by the ordinary law of contract based on *laissez faire* doctrine. Industrial jurisprudence is a developing concept. It derives its main strength from social justice which is dynamic and changing. The concept of social justice itself changes with the social, economic and political changes in society. Therefore, it has yet to take its final shape. Industrial jurisprudence cannot, with all its high ideals, displace general jurisprudence just as no amount of social justice can abrogate altogether the concept of legal justice. Even while dispensing social justice the Courts, tribunals and arbitrators, whoever it may be, cannot ignore the law. Therefore, it would be correct to say that industrial jurisprudence is a species of the same genus jurisprudence[2] and industrial jurisprudence in relation to industrial society stands in the same way just as general jurisprudence in relation to the total society.[3]

Labour Policy in India

After independence it was largely felt that the labour policy must emphasise upon self-reliance on the part of the workers. Since independence till 1954, the period when V.V. Giri was the Labour Minister, all official pronouncements emphasised that labour should become self-reliant. An equally forceful view had been to prefer reliance upon the Government. This cross-current of approach to the labour policy gave place to a new approach known as "Tripartism". Thus 'Tripartism' became the central theme in the so-called "Nanda-period" that began in 1957. During this period the Government paid reliance on three party approach, namely the trade union representing the workers, the employers, and the Government. In this kind of approach the representatives do not decide anything but their role is mainly advisory. They meet together, discuss the points in dispute and strive to reach a consensus and if they agree they make recommendations. Out of the three, the role of the Government is more important. Annual Labour Conferences and the permanent standing Labour Committees served as the chief instrument of Tripartism. These conferences advocated, amongst many things ; workers' participation in management, workers' education, works committees, and minimum wage legislations. At the sixteenth conference held in 1958 a momentous advancement was made by adopting a Code of Discipline in industry. The Code pledged the parties to avoid strikes and lock-outs without notice, and to eschew unilateral actions, and to rely on settlement of disputes by discussion by voluntary arbitration or by adopting to such measures as the law may provide. It also pledged them to avoid coercion and victimisation, to avoid partial strikes and lock-outs, and to follow grievance procedure.

Tripartism is an approach which lays stress on the identity of interests between labour and capital *i.e.*, they are the partners in the maintenance of production and the building up of the national economy. The labour policy has proceeded on a realisation that the community as a whole, as well as individual employers are under an obligation to protect the welfare of workers and to secure to them their due share in the gains of economic development.[4] This led to enacting of the Payment of Bonus Act, 1965 which aimed at providing for the payment of bonus on the basis of profits or on the basis of

1. ".....Industrial jurisprudence is the corner stone of the fabric of the entire human race". Mahesh Chandra, Industrial Jurisprudence, (1976), p. 49.
2. *Ibid.*, p. 5.
3. Samant, Industrial Jurisprudence, p. 4.
4. *See* Fourth Five Year Plan—Draft Outline (1966), p. 386.

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production or productivity.[1]

The main postulates of labour policy may be summed up as follows :[2]

(1) Recognition of the State as the custodian of the interests of the community, as the catalyst of "change" and welfare programmes.

(2) Recognition of the right of workers to peaceful direct action if justice is denied to them.

(3) Encouragement to mutual settlement, collective bargaining and voluntary arbitration.

(4) Intervention by the State in favour of the weaker party to ensure fair treatment to all concerned.

(5) Primacy to maintenance of industrial peace.

(6) Evolving partnership between the employer and employees in a constructive endeavour to promote the satisfaction of the economic needs of the community in the best possible manner.

(7) Ensuring fair wage standards and provisions of social security.

(8) Co-operation for augmenting 'production' and increasing 'productivity'.

(9) Adequate enforcement of legislation.

(10) Enhancing the status of the worker in industry.

(11) Tripartite consultation.

Industrial Revolution of India

Industrialisation in India as in any other country implies the growth of a factory system with employers and wage earners in varying circumstances and with varying characteristics, yet having some common features and it is the common features that are of interest.[3] As a consequence of the introduction of factory system production became concentrated in a few selected places, resulting in the increase of labour population at all such places. The village workers migrated to the industrial towns because of the difficulty of finding adequate livelihood in their native place. This resulted in disappearance of the popular village handicraft system because they could not compete with machine made goods. The goods produced on a mass scale with the help of machines in the industries were cheaper than the goods produced by handicraft method. But the development of industry in India brought with it a great evil inasmuch as it changed the status of a craftsman into wage-earner. Therefore, the craftsmen had to migrate from village to industrial cities in search of employment in factories.

Evils of Industrialisation

The factory system had some inherent evils to which the factory workers were exposed in the beginning. These may be divided into two heads namely, economic and social.

Economic Evils

(1) The artisan who in the handicraft system had the psychological satisfaction of producing the goods himself became in the factory system only a tender of the machine. He had to produce the goods with the help of tools and raw materials supplied by his employer and in the workshop of the employer. In the factory system of production only a part of goods were produced by a certain category of workers. Different categories of workers produced different parts of the same goods. Thus, the

1. In view of amendment of the Act in Dec. 1977 payment of bonus is mere based on profits, production or productivity. (*See* section 10 of the Bonus Act).
2. Report of the National Commission on Labour, 1969, pp. 29, 30.
3. Indian Law Institute : Labour Law and Labour Relations, p. 6.

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goods came in the final shape by the composite labour of many categories of workers. The workman in this system, did not get full psychological satisfaction of manufacturing a product by himself and this indirectly arrested his mental development and creative talents.[1]

(2) The wages paid to factory workers were quite inadequate to meet their barest needs in the new environment which was different from their rural life.

(3) The employment of factory workers was not secure in the beginning. They had to suffer occasionally from periodic unemployment and under-employment as a consequence of over-production or trade cycles. A worker could be discharged by his employer at any time without assigning any reasons therefor.

Social Evils

(1) The factories were sick not only of economic evils but also of social evils. Overcrowded cities with insanitary slums, and acute housing shortage because of large scale migration of village population to industrial towns had its natural effect on health, morality and social life of workers.

(2) Work in factories was very hazardous and strenuous with long hours duty, no rest, and no facility for recreation. Machines were taken care of by the factory owner who had little regard for the safety and welfare of the workers.

(3) Workers were exposed to serious accidents because machines were not properly screened. Accidents were considered as normal risk incidental to employment in a factory and the worker who was unfortunate victim of an accident lost his employment and had no right to compensation.

(4) The wages paid to the workers were very low. Wages were the only source of their income. The workers found it extremely difficult to live with the wages so earned by them. Therefore, they had to find out ways and means to supplement their earnings. Consequently the wives and children of workmen started seeking employment. The factory owners exploited this situation and employed them in large numbers at extremely low wages without any regard to their physical conditions.

The workers found it difficult to adjust with these conditions. These evils of industrialisation and the lack of adjustment and harmonious relationship between the employer and the labours created problems in the industry, which we call labour problems.

Labour Problems

Labour problems constituted a serious menace to the society, and needed solution, if not to eradicate then at least to mitigate them in the very beginning. Employers paid their sole attention to the maintenance of machines and the improvement of the technical know how to the utter neglect of the human hands employed to man the machines because they were readily available and could be easily replaced.[2] Workers were illiterate and poor and therefore unconscious of their rights. The socio-economic status of the workers was far below the status of their employer. As such they could not exercise their free will in negotiating with the employer for employment. The employer taking advantage of the poor condition of the workers dictated their own terms and conditions with regard to wages, hours of work, leave, etc. The workers were left with no choice but to accept such terms because service was the sole means of earning their livelihood.

Neither the Government nor the law courts took special notice of these problems because they laid too much emphasis on the policy of the non-interference and freedom

1. V.V. Giri, Labour Problems in Indian Industry, p. 115.
2. *Ibid.*

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of contract. Thus, with the lapse of time the situation turned out to be so worse and the society became so much adversely affected that the Government was compelled to take some action to remedy these problems.

Ultimately some philanthropic agencies like Servants of India Society, Social Service League and some industrial social workers raised their voice against these problems. They were successful in mobilising the public opinion in support of their view point. Workers also started to form their own organisation to fight against exploitation at the hands of industrialists. In the beginning the effort of the workers was not very successful because of their weak bargaining power and lack of resources on which they could rely for their livelihood in the absence of wages.

Some employers also realised the seriousness of the problem and the necessity of mitigating these evils for they affected the production of the industry, they felt that investment on labour welfare was a policy worth pursuing because a contended worker would produce better yields and would increase the efficiency.

The Government too later on realised the gravity of the problem and could not remain a spectator for the workers constituted a large section of the society. Moreover, the government had to intervene to settle the disputes in the interest of national economy and the welfare of the society at large.[1] If some key industry is thrown out of gear, the whole system is paralysed. Frequent break downs of even a part of the economic system tend to impoverish the community. The prevention of industrial strife thus assumes an important role in national policy and the State, therefore, cannot afford to remain indifferent to the problems leading to industrial conflict.

After independence the national government paid much attention to the improvement of the conditions of labour in industry, for the prosperity of a country depends upon the development and growth of industry. No industry can flourish unless there is industrial peace and co-operation.[2] Industrial peace is possible only with the co-operation of labour and capital. To ensure better co-operation the wage earner who is a partner in the production should be allowed to have his due share of the profit for increased production. Therefore, we have to shape our economic policy in such a manner as to give labourer his due status by offering him reasonable working conditions and due share in production. That means social justice and social security has to be restored to the labourer. Our Constitution guarantees social justice to the people of India. Social justice means achievement of socio-economic objectives. Labour legislation is one of the most progressive and dynamic instruments for achieving socio-economic progress. "There is no other branch of law which embraces such a wide and effective role in social engineering and social action. It is here that the industrial law distinguishes itself from other branches of law and awaits the development of wholly different jurisprudence to explain and expound it".[3]

Industrial Peace and Industrial Harmony

"Industrial Peace" and "Industrial Harmony" may have the same meaning but the concept of industrial peace is somewhat negative and restrictive. It emphasises absence of strife and struggle. The concept of industrial harmony is positive and comprehensive and it postulates the existence of understanding, co-operation and a sense of partnership between the employers and employees. A quest for industrial harmony is indispensable for economic progress of the country. Economic progress is bound up with both industrial harmony and industrial peace. Industrial harmony leads to more co-operation between employees and employers which results in more productivity. It is founded on

1. V.V. Giri, Labour Problems in Indian Industry, p. 119.
2. G.M. Kothari, A Study of Industrial Law, p. 38.
3. *Ibid.* p. 39.

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healthy industrial relations. Healthy industrial relations cannot, therefore, be regarded as a matter in which only the employers and employees are concerned ; it is of vital significance to the community as a whole. Therefore, industrial harmony involves the co-operation of employees and the community at large.[1]

Industrial Relations

An industry is a social world in miniture.[2] Industries help in production and provide employment to the people of society. Different categories of human elements are involved in an industry. The relations of these groups *inter se* constitute the subject matter of industrial law. Industrial relations play a vital part in the establishment and maintenance of industrial democracy. The economic activity is the central field of industrial relations. The economic system of any nation affects the industrial relations, which in turn affects the social order. A man has to struggle with his environment for earning his bread and satisfaction of his material wants. Industrial revolutions are nothing more than the struggle of men for their material satisfaction. The industrial revolutions create an imbalance in the society as they prejudicially affect the rights and interests of those sections who work in such industries but do not control it. It results in inequitable distribution of wealth because means of production are controlled by the dominant section of the society, who exploit the labour to their own maximum benefit. It is because of these far reaching consequences of the imbalance and disorder in industrial relations and because of the fact that it affects such a large and varied complex of group relationship that it was soon realised that the very existence of the State as protector of the community and as arbitrator of conflicting interests may be jeopardised if it was not to intervene in industrial matters to maintain social morality which was necessary for a healthy social order.[3] Economic progress is also bound up with industrial peace. Industrial relations are, therefore, not a matter between employers and employees alone, but a vital concern of the community which may be expressed in measures for the protection of its larger interest.[4] State intervention is also justified to prevent exploitation of the weaker section of the society by the stronger section. Industry owners are not the only party to be blamed for the industrial disorder, but the State whose duty it is to establish a just social order is equally to be blamed. Social justice requires that the State for its own existence owes an obligation to the community to bridge the gap between the two classes and evolve a healthy social order. It is from this fountain of social justice that the necessity of legal regulation of industrial relations has flown.[5] The scope of governmental legal regulation of the industrial relations depends upon the socio-economic objective that State seeks to attain and these would be reflected in the socio-economic planning and national labour policy.[6] It is further conditioned by the degree of the existing social imbalance which needs social re-adjustment and the conceived picture of ideals which feed the programme of social justice in the given socio-economic situation.[7] We in our country are mainly embarking upon industrial and technological advancement. But mere technological advance will widen the social imbalance. Advancement of knowledge of social science is necessary for reshaping social relationship. Therefore, the State must endeavour to promote studies and researches in sciences which will help in reshaping social relationship in accordance

1. Peace in industry has a great significance as a force for world peace if we consider wider implication of the question. *See* First Five Year Plan, p. 572.
2. G.M. Kothari, A Study of Industrial Law, p. 1.
3. *Ibid.*, pp. 2-3.
4. First Five Year Plan, p. 572.
5. G.M. Kothari, A Study of Industrial Law, p. 3.
6. *Ibid.*, p. 4.
7. *Ibid.*

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with the principles of social justice and socio-economic objectives.

Principles of Labour Legislation

Labour legislation in any country should be based on the principles of social justice, social equity, international uniformity and national economy.

Social justice.—Social justice implies two things. First equitable distribution of profits and other benefits of industry between industry owner and workers. Secondly, providing protection to the workers against harmful effects to their health, safety and morality. In the beginning, the position of a worker was that of a daily wage-earner, which means he was paid only for the days he actually worked. A workman was expected to accept all the hazards connected with his work as incidental to his employment. Until the passing of Workmen's Compensation Act, 1923 no compensation was paid in case of an accident taking place in the course of employment. But the Workmen's Compensation Act, 1923 guarantees to workmen compensation for any injury caused by an accident arising out of and in the course of employment. The Minimum Wages Act, the Factories Act and the Payment of Wages Act are a few other legislations based on the principle of social justice. These legislations fix the hours of work, make provision for payment of over-time, leave rules, safety, health and welfare of labour in industry. Labour welfare in our country has a special significance for our Constitution provides for the promotion of welfare of people, for humane conditions of work and securing to all workers full employment of leisure and social and cultural opportunities.[1] The word 'social justice' is neither defined in any of the labour legislations nor does it occur in any of them except the Industrial Disputes Act, 1947.[2]

The concept of social justice, according to Bhagwati, J., does not emanate from the fanciful notions of any particular adjudication but must be founded on a more solid foundation.[3] In the opinion of Justice Gajendragadkar : "The concept of social and economic justice is a living concept of revolutionary import, it gives sustenance to the rule of law and meaning and significance to the idea of welfare State".[4] The Indian Constitution enshrines the concept of social justice as one of the objectives of the State. Article 38 of the Constitution provides that "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, social order in which justice, social, economic and political, shall inform all the institutions of the national life". Article 39 ordains that it shall be the duty of the State to apply certain principles of social justice in making laws.

Social justice is justice according to social interest. So far as the application of the doctrine of social justice in the sphere of adjudication is concerned, it is subordinate to the fundamental rights and law contained in the Constitution. Secondly, it is also subservient to the statutory Industrial law. Thirdly, social justice cannot be done in disregard of law laid down by the Supreme Court. Social justice does not mean doing everything for the welfare of labour to the utter disregard of the employer. The balance of social justice leans neither side.[5] The labour policy of a country should, in the national interest, prevail over the rival economic policies in cases of conflicts.[6]

"Social justice" is designed to undo the injustice of unequal birth and opportunity, to make it possible that wealth should be distributed as equally as possible and to provide that men shall have the material things of life should be guaranteed to each

1. V.V. Giri, Industrial Relations.
2. When the Industrial Disputes Act, 1947 was amended in 1956, Section 17-A(1) uses the words 'social justice'.
3. *Muir Mills Ltd.* v. *Suti Mill Mazdoor Union*, (1955) 1 LLJ 1 (SC).
4. *State of Mysore* v. *Workers of Gold Mines*, AIR 1958 SC 923.
5. *Punjab National Bank Ltd.* v. *P.N.B. Employees Federation*, AIR 1960 SC 160.
6. G.L. Kothari, Labour Law and Practice in India, p. 15.

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man. President Roosevelt has rightly said that "there are some whose adverse circumstances made them unable to obtain the mere necessities of existence without the aid of others. To these less fortunate men and women, aid must be given by government not as a measure of charity but as social duty". This duty is to be performed by the society through the State. Social justice, therefore, is dealing equitably and fairly not between individuals but between classes of society ; the rich and the poor.

The concept of social justice has become an integral part of industrial law. It is founded on the basic idea of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities. The Constitution of India has also affirmed social and economic justice to all its citizens. Although a number of legislation have been passed with that end in view but still some more important measures need to be taken. Provisions relating to fundamental rights and directive principles of State policy provide sufficient guarantee against exploitation. Social justice has thus been made object of State policy and governmental action. Social justice though not defined in our Constitution, means attainment of the socio-economic objectives by removing existing evils and enacting new legislation to achieve these objectives.

The concept of social justice is not narrow or limited to a particular branch of legislation or adjudication although it is more prominent and conspicuous in industrial legislation and adjudication. Its sweep is comprehensive and is founded on the basic ideal of socio-economic equality and it aims at assisting the removal of socio-economic disparities and inequalities of birth and status and endeavours to resolve the competing claims especially between employers and workers by finding a just, fair and equitable solution to their human relation's problem so that peace, harmony and co-operation of the highest order prevails amongst them which may further the growth and progress of nations.[1]

Social justice is different from legal justice. The difference is not of objective but aim at dispensing justice. The difference is due to two reasons : (i) Social justice aims at doing justice between classes of society, and not between indvidual, (ii) the method which it adopts is unorthodox compared to the methods of municipal law. Justice dispensed according to the law of Master and Servant, based upon the principle of absolute freedom of contract and the doctrine of *laissez faire*, is legal justice. Social justice is something more than mere justice, it is a philosophy super-imposed upon the legal systems.[2]

Social equity.—Any legislation which is based on social justice prescribes a definite standard for adoption in future. Such standard is fixed after taking into account the past and present circumstances. Once a standard is so fixed by legislation it remains in force until it is changed or modified by another legislation passed in conformity with the legislative procedure. No discretion is given to change such law to the authority administering such law. However, where it is felt that the law should be flexible and should be changed as the circumstances and conditions change, the law empowers the Government to make such changes. This is generally done by giving the Government rule making power under the provisions of the Act. When power under the Act is given to the Government the rules may be modified to suit the changed conditions. Such legislation is said to be based on social equity.

Social Security

The mutual conflict between the employer and the employees over the question of adequacy of their respective shares in social produce, constitutes the crux of the

1. Mahesh Chandra, Industrial Jurisprudence (1976), p. 47.
2. Industrial Labour in India, p. IX., V.B. Singh Ed., 1963, Quoted in Labour Law and Labour Relations ILI p. 9.

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labour problem, of which collecitve bargaining and industrial conflict are the two most important aspects. As industrialisation advances the worker is increasingly alienated from his previous socio-cultural world and thus faces various insecurities with regard to income and employment in addition to the natural ones (*i.e.,* sickness, maternity and old age) for which the new order does not have structural provision. This is how the problem of social security arises and revolution has meant urbanisation. In ancient times if a person was unable to work on a particular day, he was cared for by the village community or by the members of his family. But now urbanisation has so deeply uprooted these values that in times of sickness, unemployment, old age and other similar contingencies a worker has nothing to fall back upon. In modern times social security is influencing both social and economic policy. Social security is the security that the State furnishes against the risks which an individual of small means cannot, today, stand up to by himself even in private combination with his fellows.[1]

The quest for social security and freedom from want and distress has been the consistent urge of man through the ages. This urge has assumed several forms according to the needs of the people and their level of social consciousness, the advancement of technology and the peace of economic development.[2] "Social security envisages that the members of a community shall be protected by collective action against social risks causing undue hardship and privation to individuals whose private resources can seldom be adequate to meet them. It covers through an appropriate organisation, certain risks to which a person is exposed".[3] "These risks are such that an individual of small means cannot effectively provide for them by his own ability or foresight alone or even in private combination with his colleagues".[4]

The concept of social security is based on ideals of human dignity and social justice. The underlying idea behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare should be given protection against certain hazards.[5]

Social security means a guarantee provided by the State through its appropriate agencies, against certain risks to which the members of the society may be exposed. Social assistance scheme provides benefit for persons of small means granted as of right in amount sufficient to meet a minimum standard of need and financed from taxation, and social insurance scheme provides benefits for persons of small earnings granted as of right in amounts which combine the contributory effort of the insured with subsidies from the employer and the State.[6]

Social security measures are significant from two view points : First, they constitute an important step towards the goal of a welfare State. Secondly, they enable workers to become more efficient and thus reduce wastage arising from industrial disputes. Lack of social security impedes production and prevents formation of a stable and efficient labour force. Therefore, social security measures are not a burden but a wise investment which yields good dividends.[7] According to the report of the National Commission on labour "social security has become a fact of life and these measures have introduced an element of stability and protection in the midst of the stresses and strains of modern life. It is a major aspect of public policy today and the extent of its

1. V.V. Giri, Labour Problems in Indian Industry, p. 247.
2. Report of the National Commission on Labour, 1969, p. 162.
3. *Ibid.*
4. I.L.O., Approaches to Social Security, 1942, p. 80, quoted in Report of the National Commission on Labour (1969), p. 162.
5. *Ibid.*
6. Approaches to Social Security, I.L.O. Montreal, pp. 80-81.
7. V.V. Giri, Labour Problems in Indian Industry, p. 248.

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prevalence is a measure of the progress made by a country towards the idea of a welfare State. It is an incentive for development, substituting as it does hope for fear in the process improving the efficiency of the working force".

Freedom from want and security against economic fear is the minimum that has to be secured to its people in the country. Its importance has been expressed by the Universal Declaration of Human Rights in the following words :

> "Every one as a member of the society has the right to social security and is entitled to realisation through national efforts and international co-operation and in accordance with the organisation and resources of each state of economic, social and cultural rights indispensable for his dignity and the free development of his personality".[1]
>
> "Every one has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood, or circumstances beyond his control."[2]

The role of International Labour Organisation in certain standards of social insurance has been significant. The Social Security (Minimum Standards) Convention adopted in 1952 embodies universally accepted basic principles and common standards of social security. The application of these principles has guarded developments of this field throughout the world.[3]

In our country, a number of social security legislations have been enacted from time to time. The earliest of such legislation is the Workmen's Compensation Act which ensures payment of compensation in case of a personal injury caused by an accident arising out of and in the course of employment. Maternity Benefit Acts have also been passed by the Parliament and also in different States. In U.P. it was passed in 1962. This Act primarily provides for maternity leave to woman workers. The Employees' Provident Fund and Family Pension Fund and Deposit-Linked Insurance Fund Act, 1952 provides for retirement benefits. The Industrial Disputes Act ensures retrenchment and lay-off benefits. The most important of all legislations is the Employees' State Insurance Act, 1948 which provides for medical, sickness, dependant, disablement and maternity benefits.

Growth of Labour Legislation in India

Labour legislation in India grew with the growth of industry. In the eighteenth century India was not only a great agricultural country but a great manufacturing country too. Asian and European markets were mainly fed by the looms supplied by India. But the British Government in India as a matter of policy discouraged Indian manufacturers in order to encourage the rising manufacturers of England. Their policy was to make India subservient to the industries of Great Britain and to make Indian people grow only raw materials.[4] The British oppression in India continued for a considerable time which led to the growth of Indian nationalism and to a vigorous renaissance. Nationalism has an obvious economic aspect which in our country was reflected in the urge for economic reforms and for industrialisation.[5] In the twentieth century the national movement took a new turn and there was a common demand for the Indian goods. A non-co-operation movement which is known as *swadeshi movement*

1. Art. 22 of the Universal Declaration of Human Rights.
2. Art. 25 of the Universal Declaration of Human Rights.
3. Report of the National Commission on Labour, (1969), p. 162.
4. R. Dutt, Economic History of India Under Early British Rule VIII-X, (1930).
5. Indian Law Institute, Labour Law and Labour Relations, p. 5.

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was started which urged upon the people to use goods made in India and to boycott foreign goods. The non-co-operation movement synchronised with periods of economic crisis gave impetus to industrialisation. Not only that, growth of Indian private sector owes much to these popular movements. No doubt, the Indian Economists, drew their inspiration from British classical Economists but they outgrew those ideas.[1] Like British Economists, Indian Economists not only advocated that the trade and commerce should be free but they laid emphasis on the free trade of local goods. An attempt was made to put forward a theory of economic development and planning suited to conditions of our country. After thirties planning was accepted by the national movement as its economic ideology. Thus, planned industrialisation became our main goal.

In India, the plantation industry in Assam was the first to attract legislative control. The method of recruitment of workers in this industry was full of hardships. Workers were employed through professional recruiters. Workers were not allowed by the planters to leave the tea gardens. A number of Acts were passed from 1863 onwards to regulate the recruitments. These legislations protected more the interests of the employers than safeguarding the interest of the workers. The Factories Act was passed in 1881 and the Mines Act in 1901. But the most important of such Acts as were passed to protect the interest of the workers was the Workmen's Compensation Act, 1923. Some other important social security legislations are : the Employees' State Insurance Act, 1948, the Employee's Provident Funds Act, 1952[2] and the Maternity Benefit Act, 1961. Laws were also made to regulate the labour management relations. Some of them are : the Industrial Disputes Act, 1947, the Trade Unions Act, 1926 and the Industrial Employment (Standing Orders) Act, 1946. Labour legislations ensuring labour welfare and minimum standards were also enacted. Some of them are : the Factories Act, 1948, the Minimum Wages Act, 1948, the Payment of Wages Act, 1936 and the Payment of Bonus Act, 1965.

In India, a number of labour legislations have been enacted to promote the condition of the labour keeping in view the development of industry and national economy. But for industrial regeneration it is necessary that the partners of the industry must cure their respective defects. Since independence both legislation and public opinion have done a lot to better the condition of the workers but unfortunately the employers have not responded very appreciably. It is high time that the employers must realise that it is their privilege as a citizen of a democratic country to relinquish their acquisitive tendencies of the past and set a new ideal for the future of the country. At the same time it is the duty of the workers and their organisations to improve the work-effeciency and help in securing better production resulting in greater profits and prosperity of the industry to be ultimately shared by the management, workers and the community at large. The employers should concede to workers a representative voice in the control of the industrial system. "Workers are the dominant partners in the industrial undertakings and without their co-operation and good work, discipline, integrity and character, the industry will not be able to produce effective results or profits. However efficient the machine touch in any industry may be, if the human element refuses to co-operate, the industry will fail to run. Therefore, the profit of the industry must be shared between employers, workers and the community ; the workers having a dominant share, being the producers of wealth".[3] The Government and the factory owners must fully understand the labour psychology and a change in their outlook and attitude is desired to secure the industrial peace. Nothing should be done under threat or coercion

1. Indian Law Institute, Labour Law and Labour Relations, at p. 6.
2. This Act, as enacted in 1952, made provision for Provident Fund only but now this Act provides for family pension funds and deposit linked insurance fund also.
3. V.V. Giri, Industrial Relations, p. 27.

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but on a clear understanding that whatever is good and is due to the labour must be given. Industry owners should treat the workers as co-partners. Similarly, "workers in the country must understand fully that if they desire to secure their due place in the industrial economy of the country they must think more in terms of responsibilities and duties and not interpret independence for impertinence and liberty for licence. Sabotage and violence of all kinds and bitterness in thought, word and deed must be eschewed. Then alone a Socialist Democracy is possible in this country and industrial relations of a higher order can be maintained for the benefit of the country and the community".[1]

Industrial Adjudication

Social and economic justice is ultimate ideal of industrial adjudication[2] and the basis lies in the guiding principles of social welfare, common good and the directive principles of State policy enshrined in the Constitution.[3] The essential function of industrial adjudication is to assist the State by helping a solution of industrial disputes.[4] Therefore, it has broadly to go by the social and economic policy followed by the State.

The twin objectives of any industrial adjudication are industrial peace and economic justice. The former implies restoration of industrial peace and goodwill in industry so as to establish harmony between labour and capital. Industrial harmony helps in boosting production which would help in general economic progress of the community and strengthen national economy. The latter implies that restoration of industrial peace and goodwill should be on a fair and just basis.[5] Injustice, social or economic, is bound to result in exploitation of labour, inequality of incomes, concentration of wealth in a few hands capitalism and class conflict.

Democratic socialism is the cherished goal of our nation. The acceptance of socialism necessarily adopts a social planning which will subserve the interest of society as against individuals or vested classes. All national institutions must have their base on the tenets of socialism.

Social philosophy of the age must also be considered. The concept of welfare State has thrown the doctrine of *laissez faire* in background. The theory of 'hire and fire' as well as the theory of 'supply and demand', which were allowed free scope under the doctrine of *laissez faire*, are no longer in practice now. In settling industrial issues the question of propriety and impropriety, fairness and unfairness are taken into account. "As the social conscience of the general community becomes more alive, and active, as the welfare policy of the State takes a more dynamic form, as the national economy progress from stage to stage and as under the growing strength of trade union movement collective bargaining enters the field, industrial issues cease to be purely arithmetical problems. Consideration of the financial position of the employer and the state of national economy have their say, and the requirements of a workman living in a civilised and progressive society also come to be recognised. It is in this sense, and no doubt to a limited extent, that the social philosophy of the age supplies the background for the decision of industrial disputes".[6]

Industrial adjudication must also promote and assist the national economy. Therefore, it becomes necessary that no award should run counter to the labour policy in a planned economy. With that end in view formulation of a rational labour policy becomes most important. A national labour policy must aim at achieving maximum

1. V.V. Giri, Industrial Relations, p. 28.
2. *Crown Aluminium Works* v. *Their Workmen*, AIR 1958 SC 30.
3. *State of Mysore* v. *Workers of Gold Mines*, AIR 1958 SC 923.
4. *State of Bombay* v. *Hospital Mazdoor Sabha*, AIR 1960 SC 610.
5. *Crown Aluminium Works* v. *Their Workmen*, AIR 1958 SC 30.
6. Kothari G.M. Labour Demands and their Adjudication, Vol. 1 (1972), p. 132.

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economic welfare, which requires that (i) the national income shall be maximised, (ii) it shall be divided equally among all the members of the economy,[1] and (iii) it shall be stable in the sense of being free from violent fluctuations.

The following are some of the guiding principles of industrial adjudication :

(1) Public interest.—Since industrial adjudication aims at promoting social and economic justice and social and economic justice rests on serving the interest of society as a whole, therefore, industrial adjudication must also sub-serve the public interest. However, public interest is not defined in our industrial law. Public interest are claims or demands or desires involved in life in a politically organised society asserted in title of that organisation.[2]

(2) Industrial harmony and goodwill.—Whatever be the system of economy, stress in invariably laid on increased productivity, wherein only lies the hopes of increased national wealth. Interested productivity depends on the existence of conditions of harmony and goodwill in industry and workers. Peace and goodwill in industry involve not only absence of industrial conflict and peace is not merely a negative but also a positive concept.[3] Industrial adjudication, therefore, must bear this consideration in solving industrial issues.[4]

For industrial harmony mutual understanding and co-operation between several interests which take part in the process of production is essential. This will depend upon fair dealing and establishment of good working conditions. For industrial peace, acceptance of trade unionism is necessary. Some have advocated even of acceptance of labour organisations as part of an emerging system of representative government in the sphere of industrial relations.

(3) Development of industrial justice.—Lasting peace in any industry is possible only when an attempt is made to eliminate the real causes of conflict. Therefore, restoration of peace with justice is necessary. Both social and economic justice are essential for obtaining whole hearted co-operation of labour in the task of production. For labour co-operation equitable distribution of the gains is necessary.

The principle of equality should also be taken into consideration. Social justice requires equal work and equal pay for men and women and equality of opportunity, etc. Equality in economic order is said to be an indispensable part of social justice because it is equality in economic life that sets the process of social inequality, political weakness and evolution of community with superior and inferior classes.[5] Justice requires acceptance of the principle of equality.

Justice also lies in adjustment of rival claims in a fair and just manner. In the case of industrial adjudication the claims for the employer based on the freedom of contract have to be adjusted with the claims of industrial employees for social justice. The task of making a reasonable adjustment, is not always easy, and so, in reaching conclusions in such a matter it is essential not to decide more than is necessary. If industrial adjudication purports to lay down broad general principles it is likely to make its approach in future cases inflexible and that must always be avoided.[6] In *State of Mysore* v. *Workers of Gold Mines*[7] the Supreme Court also observed that : "In its attempt to do social justice industrial adjudication has to adjust rival claims of the employer and his

1. There is some controversy about this view, although the correctness of this view does not affect the validity of the objective.
2. Roscse Pound, Outlines of Lectures on Jurisprudence, p. 49.
3. Kothari, G.M., Labour Demands And Their Adjudication (1972), p. 136.
4. *Mill Mazdoor Sabha* v. *Swastik Textiles Ltd.* (1965) 11 FJR 236 (IT).
5. Kothari, G.M., Labour Demands and Their Adjudication (1972), p. 140.
6. *Ibid.*
7. AIR 1958 SC 923.

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workmen in a fair and just manner and this object can best be achieved by dealing with each problem as it arises on its own facts and circumstances".

(4) **Expert assistance.**—Whenever a Tribunal has before it a matter which requires expert assistance in collecting and assessing the appropriate material as to technical matters, the Tribunal, should avail itself of such assistance. The ultimate decision would, no doubt, rest with the Tribunal, but since the decision has to be based on proper material, the Tribunal must not deny to itself opportunity of expert assistance in obtaining and assessing the appropriate material.[1]

(5) **Socio-economic effects.**—While it is true that the industrial tribunals are not social or economic legislatures, it does not mean that they should have no concern with the social and economic effects of the awards.[2] If any decision is made without taking into consideration its socio-economic effects it may have upon industry or community, it may lose much of its validity.

(6) **Reference to facts and circumstances of each case.**—In industrial adjudication laying down of inflexible general rules must be avoided. The more proper approach is to bear in mind all the relevant facts which govern the case and the decision of a question must depend upon the evaluation of all such factors.[3]

(7) **Tribunals to act in a judicial manner.**—The Tribunals must act in a judicial manner. It must ensure that all material evidence is brought to its notice and every opportunity is given to test that evidence by effective cross-examination. It must also consider the evidence produced before it objectively and must reach its final conclusions in a judicial manner.[4]

(8) **Expediency is no consideration.**—It is very often impossible to arrive at just settlement of a dispute which satisfies either all or even one of the parties to the dispute. In the true award making there is no place to expediencey or opportunities, disputes must be determined regardless of any dissatisfaction that may occur to an unsuccessful party.[5]

(9) **Acceptability of decisions.**—It is the duty of an arbitrator or adjudicator to make an award which may be acceptable to both the parties to be workable. He must aim at a possible compromise. He has also to keep in mind that a decision is useless if it cannot be enforced and that the power and ability of the respective parties to administer a decision successfully is an integral part of the decision. However, if acceptable decision cannot be secured, the arbitrator or adjudicator owes a duty to give his award.

To sum up it may be said that in dealing with industrial dispute, the tribunals should not be unduly influenced by academic questions of law. They should as far as possible, deal with the merits of each case according to its facts and circumstances.[6]

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1. *National Iron & Steel Co. Ltd.* v. *Their Workmen*, AIR 1963 SC 325.
2. *Queen* v. *Kelly & Ors. Ex parte, Australian Ry. Union*, (1953) 89 CLR 472.
3. *Anakapalla Co-operative Agricultural and Industrial Society* v. *Its Workmen*, AIR 1963 SC 1489.
4. *Associated Cement Companies Ltd.* v. *Their Workmen*, AIR 1959 SC 967.
5. Industrial Conciliation and Arbitration, Orwell De R, Foenander 2, p. 63.
6. *Kays Construction Co. (Pvt.)* v. *Its Workmen*, AIR 1959 SC 208.

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THE INDUSTRIAL DISPUTES ACT, 1947

CHAPTER I
PRELIMINARY

Introduction.—During post-independence era we have witnessed the development of a new jurisprudence, namely the 'Industrial Law'. The Industrial Law in pre-independence days was in a rudimentary form. But later on with the development of industry, the Industrial Law developed side by side. The growth of this law was slow in the beginning but gained its pace in the recent years as is evident from the bulk of the cases before the Supreme Court on Industrial law matters. A large section of the Indian population is affected by Industrial Laws. Some like industrialists and their workmen are directly affected and many others are unconsciously affected by these laws. The economic growth of a country depends upon the industrial development. Therefore, the progress of a country being dependent upon the development of industry, the Industrial Laws play an important role in the national economy of a country.

Section 1. Scope and object.—The object of the industrial relations legislation in general is industrial peace and economic justice. The prosperity of any industry very much depends upon its growing production. The production is only possible when the industry functions smoothly without any interruptions. There are some other factors that influence the production, namely absence of disputes, *i.e.*, harmonious relationship between the labour and the management. Therefore, every industrial relations legislation necessarily aims at providing conditions congenial to the industrial peace.

Economic justice is another objective aimed at by such legislations. Almost all interruptions in production are due to industrial disputes. Dissatisfaction with the existing economic conditions is the root cause of industrial disputes. The history of labour struggle is nothing but a continuous demand for fair return to labour expressed in varied forms, *e.g.*, (a) increase in wages, (b) resistance to decrease in wages, and (c) grant of allowance and benefits, etc.[1] If a labourer wants to achieve these gains individually, he fails because of his weaker bargaining power, the management with better economic footing stands in a better position to dictate its terms. Therefore, the economic struggle of labour with capital is fought collectively by organised labours. If the labour organises and bargains collectively, he is definitely placed in a position to exert greater pressure upon the capital to provide them fair return to their labour. It is with a view to provide economic justice by ensuring fair return to the labour that the State as the custodian of public interest intervenes by 'State regulation'. Economic justice has also been ensured to the people of India by our Constitution.

The Industrial Disputes Act, 1947 extends to the whole of India. It came into operation on the first day of April, 1947. The object of the Act as laid down in the preamble of the Act is to make provision for the investigation and settlement of industrial disputes. The object of all labour legislations is to ensure fair wages and to prevent disputes so that production might not be adversely affected.[2] The principal

1. *Hariprasad* v. *A.D. Divekar*, AIR 1957 SC 121.
2. *Banaras Ice Factory Ltd.* v. *Its Workmen*, AIR 1957 SC 167.

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objects of the Act as analysed by the Supreme Court are as follows :[1]

(1) The promotion of measures for securing amity and good relations between the employer and workmen ;

(2) An investigation and settlement of industrial disputes between employers and employers, employers and workmen or workmen and workmen with a right of representation by a registered Trade Union or federation of Trade Unions or Association of employers or a federation of association of employers ;

(3) The prevention of illegal strikes and lock-outs ;

(4) Relief to workmen in the matter of lay-off, retrenchment and closure of an undertaking ;

(5) Collective bargaining.

The Industrial Disputes Act is a progressive measure of social legislation aiming at the amelioration of the conditions of workmen in industry.[2]

Main Features of the Act.—Some of the distinguishing features of the Industrial Disputes Act, 1947 may be summarised as under :—

(1) Any industrial dispute may be referred to an industrial tribunal by an agreement of parties to the dispute or by the State Government if it deems it expedient so to do.

(2) An award shall be binding on both the parties to the dispute for the specified period not exceeding one year. It shall be normally enforced by the Government.

(3) Strike and lock-outs are prohibited :

(i) during the pendency of conciliation and adjudication proceedings ;

(ii) during the pendency of settlements reached in the course of conciliation proceedings ; and

(iii) during the pendency of awards of Industrial Tribunal declared binding by the appropriate Government.

(4) In public interest or emergency the appropriate Government has power to declare the transport (other than railways), coal, cotton textiles, food stuffs and iron and steel industries to be a public utility service for the purposes of this Act, for a maximum period of six months.

(5) In case of lay off or retrenchment of workmen the employer is required to pay compensation to them.

(6) Provision has also been made for payment of compensation to workmen in case of transfer or closure of an undertaking.

(7) A number of authorities such as, Works Committee, Conciliation Officers, Board of Conciliation, Courts of Inquiry, Labour Courts, Tribunal and National Tribunal are provided for settlement of industrial disputes. The nature of powers, functions and duties of these authorities differ from each other but each one of them plays an important role in ensuring industrial peace.

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Section 2. Definitions

(a) Appropriate Government.—The Central Government as well as the State Government are vested with various powers and the duties in relation to matters dealt with in this Act. In relation to some industrial disputes the Central Government and in relation to some others the State Government concerned are the Appropriate Government to deal with such disputes. Therefore, to avoid repetition, it was expedient

1. *Workmen of Dimakuchi Tea Estate* v. *Management of Dimakuchi Tea Estate*, AIR 1958 SC 353.
2. *S.N. Rai* v. *Vishwanath Lal*, AIR 1960 Patna 10.

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to use a phrase which may be used in the same sense in different sections of the Act. The appropriate Government is the Central Government in relation to the following :

(i)(a) any industry carried on by or under authority of the Central Government or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government ; or

(i)(b) a Dock Labour Board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948, or the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956, or the Employees' State Insurance Corporation established under Section 3 of the Employees' State Insurance Act, 1948, or the Board of Trustees constituted under Section 3-A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948, or the Central Board of Trustees and the State Boards of Trustees constituted under Section 5-A and Section 5-B, respectively, of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, or the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956, or the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956, or the Deposit Insurance and Credit Guarantee Corporation established under Section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961, or the Central Warehousing Corporation established under Section 3 of the Warehousing Corporations Act, 1962, or the Unit Trust of India established under Section 3 of the Unit Trust of India Act, 1963, or the Food Corporation of India established under Section 3, or a Board of Management established for two or more contiguous States under Section 16 of the Food Corporations Act, 1964, or the Airports Authority of India constituted under Section 3 of the Airports Authority of India Act, 1994, or a Regional Rural Bank established under Section 3 of the Regional Rural Banks Act, 1976, or the Export Credit and Guarantee Corporation Limited, or The Industrial Reconstruction Bank of India or The National Housing Bank established under section 3 of the National Housing Bank Act, 1987 or the Banking Service Commission established under section 3 of the Bank Service Commission Act, 1975 or an air transport service, or a banking, or an insurance company, a Mine, an Oil Field, a Cantonment Board, or a Major port.

(ii) In all other cases the Appropriate Government is the State Government, within whose territory the industrial dispute arises.

Whether the Appropriate Government is the Central Government or the State Government depends on the subject-matter of the dispute. The general principle on which the broad classification of the Central or State authority over the industrial disputes is based is that in case of an industry carried on by or under the authority of the Central Government, or the industry being located in more than one State, the Appropriate Government is the Central Government so that the problems may be conveniently and uniformly dealt with.

In *Bharat Glass Works (Private) Ltd.* v. *State of West Bengal*,[1] the appellant carried on an industry in the manufacture of glass and ceramics. Their contention was that it was a 'controlled industry' and as such the Central Government being the Appropriate Government, the reference made by the Government of West Bengal was bad. It was held that "an industry mentioned in the first Schedule of the Industries (Development and Regulation) Act, 1951 is a 'controlled industry', but it is not necessarily an industry carried on by or under the authority of the Central Government.....For an industry to be carried on under the authority of the Central Government, it must be an industry

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1. AIR 1957 Cal 347.

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belonging to the Central Government, *i.e.*, its own undertaking".

In *Shri Sankara Allom Ltd.* v. *The State of Travancore Cochin*,[1] it was held that merely because the manufacture of salt was carried on by the company under a licence from Government, it cannot become a Government business or one carried on under authority of the Government.

The Kerala High Court in *India Naval Canteen Control* v. *Industrial Tribunals*,[2] has held that "the question as to whether an industry is carried on by or under the authority of the Central Government, is essentially a question of fact depending on the circumstances of each case". As such a business carried on by a Naval Canteen Control Board was held not to be carried on by or under the authority of Central Government, even if the trust was constituted by the Central Government.[3]

In the light of the above two cases we come to the conclusion that simply because an industry is a "controlled industry" or the necessary licence is granted by the Central Government, the industry is not necessarily one carried on by or under the authority of the Central Government.

What this section requires is not only that the industry should be a controlled industry but also that Central Government must specify "in this behalf" that the industry concerned is a controlled industry. In other words, the specification must be taken by the Central Government by reference to, and for the purposes of this Act, in order that the Central Government may itself become the appropriate Government *qua* such industry under this provision.[4]

When a Banking or an Insurance Company has its branches in more than one States, the Appropriate Government, in case of an industrial dispute relating to such company is the Central Government.

In *R.P.F. Commissioner Karnataka* v. *Workmen*,[5] the question for consideration was whether the Government of a State can be treated as the "Appropriate Government" under this section in relation to any industrial dispute concerning the office of the Regional Provident Fund Organisation established by the Central Government for the State under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. It was held that in the absence of the State Board, the Regional Committee constituted under Paragraph 4 of the Scheme is required to function under the control of the Central Board. Regional Provident Fund Commissioner who is appointed by the Central Government is also under the control of the Central Board and the Central Government, therefore, Appropriate Government in relation to Regional Provident Fund Commissioner is the Central Government.

It was held in *Goa Sampling Employees' Association* v. *General Superintendence Co. of India Pvt. Ltd. and others*,[6] that in case of a dispute arising in Union Territory reference may be made by the Central Government since Central Government is the Appropriate Government in relation to a Union Territory.

In *Administrative Officer, Central Electro Chemical Research Institute, Karaikudi* v. *State of Tamil Nadu*,[7] the question was whether the Central or State Government was the Appropriate Government in respect of the National Laboratory set up by its parent body *i.e.*, Council of Scientific and Industrial Research (CSIR). It was held that the Central Electro Chemical Research Institute as well as the CSIR were functioning under

1. AIR 1955 TC 662.
2. (1965) 2 LLJ 336.
3. *Ibid.*
4. *Bijay Cotton Mills Ltd.* v. *Their Workmen and another*, AIR 1960 SC 692.
5. (1984) 2 LLJ 503 (SC).
6. (1987) 2 Lab LJ 217 (SC).
7. (1990) Lab IC 1815 (Mad).

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the authority of the Central Government notwithstanding the fact that CSIR was held not an authority under the Central Government within the meaning of Article 12 of the Constitution. The Courts' conclusion was supported by the notification of the Central Government wherein it has been stated that CSIR is a society owned and controlled by the Central Government. The award was quashed because the reference was made by the State Government.

Similarly in *M/s. J.R. Jugele, Railway Contractor* v. *Smt. Sitabai Atmaram*,[1] the services of the respondent were terminated by the contractor who was her immediate employer. The petitioner was a contractor of South Eastern Railways and he has engaged labourers on the premises of railways at the rates fixed by the railways. The dispute regarding termination of services was referred by the State Government for adjudication to Labour Court. The award was challenged and it was held that in view of the fact that Contract Labour (Regulation and Abolition) Act, 1970 was applicable in the case, the S.E. Railway was the principal employer and the contractor was immediate employer of respondent. The award was quashed because in the opinion of the High Court the work was connected with S.E. Railway, the Central Government was the Appropriate Government to refer the dispute.

In *General Employees Association* v. *Union of India and others*,[2] a canteen was run by a contractor Suvidha Catering Service in the establishment and premises of the Hindustan Petroleum Corporation Ltd. (a public sector corporation). It was held that in case of a dispute in respect of employees of canteen the Central Government will be the Appropriate Government because the corporation maintains the canteen under the Factories Act and the appropriate Government in case of Corporation is the Central Government.

(aa) Arbitrator.—Arbitrator includes an Umpire.

(aaa) Average Pay.—"Average Pay" means the average of the wages payable to a workman. The expression 'Average Pay' is defined by reference to the average wages. Therefore, 'average wages' instead of 'average pay' would have been the more appropriate phrase for this definition. This definition lays down the method of calculating average pay in respect of a workman whether he is paid by month, by week or by day.

Average Pay in case of a workman means :

(i) in the case of monthly paid workmen—the average of monthly wages payable in three complete calendar months ;

(ii) in the case of weekly paid workmen—the average of the weekly wages payable in four complete weeks ;

(iii) in the case of daily paid workman—the average of the wages for twelve full working days.

But any of the above three periods must be the period preceding the date on which the average pay becomes payable, provided the workman had worked during the said period. Where the calculation of the average pay is not possible because the workman has not put in the required service, the average pay shall be calculated as the average of the wages payable to a workman during the period he actually worked.

(b) Award.—'Award' means an interim or final determination of any industrial dispute or of any question relating thereto. The determination must be by any Labour Court, Industrial Tribunal, or National Tribunal. It includes an arbitration award made under Section 10-A.

The definition of award falls in two parts. The first part covers a determination,

1. (1991) 1 Lab LJ 233.
2. (1992) 1 Lab LJ 242 (Bom).

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final or interim, of any industrial dispute. The second part takes in a determination of any question relating to an industrial dispute. But the basic postulate common to both the parts of definition is the existence of an industrial dispute, actual or apprehended. The "determination" contemplated by definition is of the industrial dispute or a question relating thereto on merits. In order to be an award a determination must be an adjudication of a question or point relating to an industrial dispute which has been specified in the order of reference or is incidental thereto, and such adjudication must be one on merits.[1]

Award includes final as well as an interim determination. The tribunal can grant only such interim awards which they are competent to grant at the time of final award, because the relief, which the Tribunal has no right to grant at the time of final determination, shall be outside its authority at any stage of the proceedings.

In *Hotel Imperial, New Delhi* v. *Hotel Workers Union*,[2] workmen of three hotels in New Delhi were suspended on the charge of misconduct pending applications under Section 33. The Tribunal had ordered these workmen to be paid their wages plus Rs. 25/- per month in lieu of food till final decision with regard to their dismissal. On appeal the Supreme Court stayed the order of the Tribunal on the condition that the workmen should be paid a sum equal to half of the amount adjudged payable by the Tribunal in respect of arrears accrued till then and continue to pay a proportionate amount till the decision of the dispute. It was also contended that the tribunal could not adjudicate upon the question on interim relief because it was not referred to it. But the Supreme Court did not agree with this view because "interim relief, where it is admissible, can be granted as a matter incidental to the main question without being itself expressed in plain terms". It was further held that ordinarily interim relief should not be the whole relief that the workmen would get if they finally succeeded.

In this regard the following principles are noteworthy :

(1) An interim award is not the final determination of some of the points involved in an industrial dispute. It is a provisional or temporary arrangement made in a matter of urgency and subject to a final adjustment on the final determination of a dispute.

(2) Interim relief is granted in aid of the final relief to be granted. If final relief itself cannot be granted no temporary relief of the same nature can be given. While awarding interim relief, the final adjustment to be made at the time of the award must be kept in mind.

Finding on a preliminary issue is not an interim award.[3] In giving retrospective effect to the awards the tribunal should take into consideration that the Tribunal had on other occasions, given increases to the workmen, it being immaterial whether the increases were referable to the actual matter of dispute before the Tribunal. As observed by the Supreme Court no retrospective operation can be given to an award for any period previous to the date on which the demands in question were made.[4] In view of Section 17 which says that a tribunal may make its award operative from any date specified in the award, a tribunal has jurisdiction to grant an award retrospectively.[5] But an Industrial Tribunal cannot by way of interim relief direct the employer to reinstate the workman, pending the disposal of an application under Section 33-A.[6]

1. *Cox and Kings (Agents) Ltd.* v. *Their Workmen*, AIR 1977 SC 1666.
2. AIR 1959 SC 1342.
3. *Tanneries of Dindigal* v. *Their Workmen*, (1955) 2 LLJ 171.
4. *Jhagra Khand Collieries (Private) Ltd.* v. *Central Government, Industrial Tribunal, Dhanbad*, (1960) 2 LLJ 71.
5. *Caltex (India) Ltd.* v. *Industrial Tribunal No. 2 Ernakulam*, (1961) 2 LLJ 85 (Kerala).
6. *Delhi Cloth and General Mills* v. *Additional Industrial Tribunal*, (1960) 2 LLJ 712.

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Enforcement of an award.—An award may be enforced in the following ways :

(1) The aggrieved party may apply to Appropriate Government for prosecuting the defaulting party under Section 29 or Section 31 of this Act.

(2) Where any money is payable by the employer to a workman, the workman may move the Appropriate Government for recovery of the money due to him under the award.

(3) The party in whose favour the award has been granted may file a suit and obtain a decree, which shall be enforced by execution under the provisions of the Civil Procedure Code.[1]

Where the interim order did not determine any part of the industrial dispute or any other question relating thereto but only determined whether the Industrial Tribunal has been properly constituted to which the industrial dispute could be referred for adjudication such order cannot be said to be an award as defined in Section 2(b).[2] Award of the Labour Court allowing a meagre amount as house rent allowance to the workers who are paid very low remuneration cannot be said to be unreasonable when financial position of the company is sound.[3]

(bb) Banking Company.—'Banking company' means a banking company as defined in Section 5 of the Banking Companies Act, 1949. In addition to that the company must have its branches or other establishment in more than one State. It also includes the Industrial Development Bank of India, the State Bank of India, the Reserve Bank of India, a corresponding new Bank constituted under Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, and any subsidiary Bank as defined in the State Bank of India (Subsidiary Bank) Act, 1959. Section 5 of the Banking Companies Act defines a banking company as any bank which transacts the business of banking in India.

Any company which is engaged in the manufacture of goods or carries on any trade which accepts deposits of money from the public merely for the purpose of financing its business as such, the manufacture or trade shall not be deemed to transact the business of banking within the meaning of the expression "banking company" as defined in the Banking Companies Act, 1949.

For any company to be a Banking Company two conditions are necessary :

(i) It must be a banking company as defined above ; and

(ii) It must have branches or other establishment in more than one State of India.

(c) Board.—"Board" means a Board of Conciliation constituted under this Act. Instead of using a large expression a single word denoting the same meaning as 'Board of Conciliation' has been used.

(cc) Closure.—"Closure" means the permanent closing down of a place of employment or part thereof.

(d) Conciliation Officer.—"Conciliation Officer" means a conciliation officer appointed under this Act.

(e) Conciliation Proceeding.—"Conciliation Proceeding" means any proceeding held by a Conciliation Officer or Board under this Act.

(ee) Controlled Industry.—"Controlled Industry" means any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest. Therefore, a controlled industry implies an industry which is controlled by the Union, *i.e.*, the Central Government. But that is not enough. Any industry in order to be controlled industry must not only be controlled by the Central

1. *Bharat Bank Ltd.* v. *Their Employees*, AIR 1950 SC 188.
2. *A.C.E.S. Corpn.* v. *Workmen*, AIR 1971 P & H 274.
3. *C.B. Products* v. *Workmen*, AIR 1971 SC 2134.

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Government but must also be declared by the Central Act to be controlled by the Union and that such control by the Central Government be expedient in the public interest.

Therefore, for the application of this clause the following requisites are necessary :

(i) Any industry which is actually under the control of the Central Government.

(ii) It should have been declared by a Central Act to be an industry the control of which by the Central Government is expedient in public interest.

(f) Court.—"Court" means a Court of Inquiry constituted under this Act.

(g) Employer.—Section 2(g) of the Act states the meaning of the word 'employer' in relation to industries carried on by or under the authority of (i) Central Government, (ii) State Government, and (iii) Local Authorities.

The employer means, in relation to an industry carried on by or under the authority of any department of the Central Government or State Government the authority prescribed in this behalf, or where no such authority is prescribed the head of the department. So also the employer means, in relation to an industry carried on by or on behalf of a local authority, the Chief Executive Officer of that authority.

Therefore, the employer means, the Central Government, or State Government; or the local authority in relation to industries carried on by or under their authority respectively. But the definition is neither exhaustive nor inclusive. The employer in relation to industries carried on by any other authority will be used in its normal sense. It does not imply that under this Act the employer only means the Central or State Government or a local authority ; and where the industry is carried on by any other authority such authority shall not be employer. This question was first sought to be argued before the Federal Court in *Western India Automobile Association* v. *The State of Bombay*.[1] The Federal Court was of the opinion that the definition is neither exhaustive nor exclusive. The definition of the term 'employer' in relation to industries carried on by Central, State or local authorities has expressly been given because it is not easy to discover in such cases with certainty the authority or individual of that description.[2] The industries run or owned by the authorities other than the Central and State Governments or local authorities, were also covered by this expression under the Act.

Where a worker or group of workers labour to produce goods or services and these goods or services are for the business of another that other is, in fact the employer.[3]

(gg) Executive.—Executive in relation to a Trade Union means the body by whatever name called, to which the management of the affairs of the Trade Union is entrusted.

(i) Independent.—Section 2(i) of the Act gives the meaning of the word "independent" for the purposes of appointment of a person as the Chairman or other member of a Board, Court or Tribunal. In order that a person may be eligible for his appointment to these bodies he must possess two qualifications :

(i) He must be unconnected with the industrial dispute in question ; or

(ii) He must be unconnected with any industry directly affected by such dispute.

The proviso attached to this sub-section provides that no person shall cease to be independent merely because he is a shareholder of an incorporated Company which is connected with, or is likely to be affected by the industrial dispute in question. But a person, who is a shareholder of an incorporated company shall disclose to Appropriate Government the nature and extent of the share held by him in such company. These

1. AIR 1949 FC 111.
2. *Ibid.*
3. *Hussainbhai* v. *Alath Factory Tezhilali Union*, AIR. 1978 SC 1410.

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precautions have been taken so that any person having special interests in a company may not be appointed. Where the nature and extent of shares held by a person is so large that he may not remain independent, the Government probably will not appoint such person.

(j) **Industry.**—Industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen.

This definition is in two parts. The first says that industry means any business, trade, undertaking, manufacture or calling of employers and the second part provides that it includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen. "If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part takes in the different kinds of activity of employees mentioned in the second part. But the second part standing alone cannot define industry. By the inclusive part of the definition the labour force employed in any industry is made an integral part of the industry for the purpose of industrial disputes although industry is ordinarily something which employers create or undertake".[1] However, the concept that "industry is ordinarily something which employers create or undertake" is gradually yielding place to the modern concept which regards industry as a joint venture undertaken by employers, and workmen, an enterprise which belongs equally to both.[2] Further it is not necessary to view definition of industry under Section 2(j) in two parts. The definition read as a whole denotes a collective enterprise in which employers and employees are associated. It does not consist either by employers alone or by employees alone.[3] An industry exists only when there is relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocations as detailed in the definition and employ workmen.[4] Thus, a basic requirement of 'industry' is that the employers must be 'carrying on any business, trade, undertaking, manufacture or calling of employers'. There is not much difficulty in ascertaining the meaning of the words business, trade, manufacture, or calling of employers in order to determine whether a particular activity carried on with the co-operation of employer and employees is an industry or not but the difficulties have cropped up in defining the word 'undertaking'.

"Undertaking" means anything undertaken, any business, work or project which one engages in or attempts, or an enterprise. It is a term of very wide denotation. But all decisions of the Supreme Court are agreed that an undertaking to be within the definition in Section 2(j) must be read subject to a limitation, namely, that it must be analogous to trade or business.[5] Some working principles have been evolved by the Supreme Court in a number of decisions which furnish a guidance in determining what are the attributes or characteristics which would indicate that an undertaking is analogous to trade or business. The first of such principles was stated by Gajendragadkar, J. in *Hospital Mazdoor Sabha* case[6] as follows :

"As a working principle it may be stated that an activity systematically or

1. *Madras Gymkhana Club Employees Union* v. *Management of Madras Gymkhana Club,* AIR 1968 SC 554.
2. *Workmen, I.S. Institution* v. *I.S. Institution,* AIR 1976 SC 145.
3. *Management of Safdarjang Hospital, Delhi* v. *Kuldip Singh,* AIR 1970 SC 1407.
4. *Ibid.*
5. *Workmen, I.S. Institution* v. *I.S. Institution,* AIR 1976 SC 145.
6. *State of Bombay* v. *Bombay Hospital Mazdoor Sabha,* AIR 1960 SC 610.

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habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an undertaking. Such an activity generally involves the co-operation of the employer and the employees ; and its object is the satisfaction of material human needs. It must be organised or arranged in a manner in which trade or business is generally organised or arranged. It must not be casual, nor must it be for one's self nor for pleasure. Thus the manner in which the activity in question is organised or arranged, the condition of the co-operation between the employer and the employee necessary for its success and its object to render material service to the community can be regarded as some of the features which are distinctive of activities to which Section 2(j) applies."

In *Bangalore Water Supply* v. *A. Rajappa*[1] a seven Judges' bench of the Supreme Court exhaustively considered the scope of industry and laid down the following test which has practically reiterated the test laid down in *Hospital Sabha* case :

Triple Test.—Where there is (i) systematic activity, (ii) organised by co-operation between employer and employee (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes, *prima facie*, there is an "industry" in that enterprise. This is known as tripple test.

The following points were also emphasised in this case :

(1) Industry does not include spiritual or religious services or services geared to celestial bliss, *e.g.*, making, on a large scale, *prasad* or food. It includes material services and things.

(2) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(3) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(4) If the organisation is a trade or business it does not cease to be one because of philanthropy animating the undertaking.

Therefore the consequences of the decision in this case are that professions, clubs, educational institutions co-operatives, research institutes, charitable projects and other kindered adventures, if they fulfil the triple test stated above cannot be exempted from the scope of Section 2(j) of the Act.

Dominant nature test.—Where a complex of activities, some of which qualify for exemption, others not, involve employees on the total undertaking some of whom are not workmen or some departments are not productive of goods and services if isolated, even then the predominant nature of the services and the integrated nature of the departments will be true test, the whole undertaking will be "industry" although those who are not workmen by definition may not benefit by status.[2]

Exceptions.—A restricted category of professions, clubs, co-operatives and even *gurukulas* and little research labs, may qualify for exemption if in simple ventures, substantially and, going by the dominant nature criterion substantively, no employees are entertained but in minimal matters, marginal employees are hired without destroying the non-employee character of the unit.[3]

If in pious or altruistic mission, many employ themselves, free or for small honorarium or like return, mainly drawn by sharing in the purpose or cause, such as

1. AIR 1978 SC 548.
2. *Bangalore Water Supply* v. *A. Rajappa*, AIR 1978 SC 548.
3. *Ibid*.

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lawyers volunteering to run a free legal services, clinic or doctors serving in their spare hours in a free medical centre of ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical are hired. Such elementary or like undertakings alone are exempt not other generosity, compassion, developmental passion or project.[1]

Sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by Government or statutory bodies.[2] Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).[3]

It was further observed that :

> "Undertaking must suffer a contextual and associational shrinkage as explained in *D.N. Banerjee* v. *P.R. Mukherjee*,[4] so also, service calling and the like. This yields to the inference that all organised activities possessing the triple elements abovementioned, although not trade or business, may still be industry provided the nature of the activity, *viz.*, the employer-employee basis, bears resemblance to what is found in trade or business. This takes into the fold of "industry" undertaking, callings and services, adventures analogous to the carrying on of trade or business. All features other than the methodology of carrying on the activity, *viz.*, in organizing the co-operation between employer and employee, may be dissimilar. It does not matter if on the employment terms there is analogy".[5]

Cases overruled—The decisions of Supreme Court in *Management of Safdarjung Hospital, Delhi* v. *Kuldip Singh*[6], *N.U.C. Employees* v. *Industrial Tribunal*,[7] *Madras Gymkhana Club Employees Union* v. *Management*[8], *University of Delhi* v. *Ram Nath*,[9] *Dhanrajgiri Hospital* v. *Workmen*[10] and such other rulings whose ratio runs counter to the principles enunciated in *Bangalore Water Supply* v. *A. Rajappa*[11] case have been overruled.

Is Municipal Corporation an Industry.—*D.N. Banerjee* v. *P.R. Mukherjee*[12] is a leading case on the point. In this case the Budge Budge Municipality dismissed two of its employees, Mr. P.C. Mitra, a Head clerk and Mr. P.N. Ghose a Sanitary Inspector on charges for negligence, insubordination and indiscipline. The Municipal Workers Union of which the dismissed employees were members questioned the propriety of the dismissal and the matter was referred to the Industrial Tribunal. The Tribunal directed reinstatement and the award was challenged by the Municipality on the ground that its duties being connected with the local self-government it was not an industry and the dispute was not an industrial dispute and therefore reference of the dispute to the tribunal was bad in law. The Supreme Court observed that in the ordinary or

1. *Bangalore Water Supply* v. *A. Rajappa*, AIR 1978 SC 548.
2. *Ibid.*
3. *Ibid.*
4. AIR 1953 SC 58.
5. *Bangalore Water Supply* v. *A. Rajappa*, AIR 1978 SC 548.
6. AIR 1970 SC 1406.
7. AIR 1962 SC 1080.
8. AIR 1968 SC 554.
9. AIR 1963 SC 1873.
10. AIR 1975 SC 2032.
11. AIR 1978 SC 548.
12. AIR 1953 SC 58.

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non-technical sense industry or business means an undertaking where capital and labour co-operate with each other for the purpose of producing wealth in the shape of goods, tools etc. and for making profits. In the opinion of the Court every aspect of activity in which the relationship of master and servant or employer and employees exists or arises does not become an industry. There is nothing however, to prevent a statute from giving the words 'industry' and 'industrial dispute' a wider and more comprehensive import in order to meet the requirements of rapid industrial progress and to bring about in the interest of industrial peace and economy, a fair and satisfactory adjustment of relations between employers and workmen in a variety of fields of activity.

It was further observed that 'undertaking' in the first part and industrial occupation or avocation in the second part of Section 2(j) obviously mean much more than what is ordinarily understood by trade or business. The definition was apprently intended to include within its scope what might not strictly be called a trade or business. Neither investment of capital nor profit making motive is essential to constitute an industry as they are generally necessary in a business. A public utility service such as railways, telephones, and the supply of power, light or water to the public may be carried on by private companies or business corporations and if these public utility services are carried on by local bodies like a Municipality they do not cease to be an industry.

For the reasons stated above Municipal Corporation was held to be an industry. Subsequently in *Baroda Borough Municipality* v. *Its Workmen*[1] also the corporation was held to be an industry.

Nagpur Corporation v. *Its Employees*[2] is another important judicial decision on the point. In this case the question for consideration was the meaning of the expression "analogous to the carrying on of a trade or business" and the issue whether all the departments of a Municipal Corporation are induced in the definition of industry. Answering the first question Supreme Court explained that as far the meaning of 'analogous to the carrying on of a trade or business' is concerned the emphasis was more on "the nature of the organised activity implicit in trade or business than to equate the other activities with trade or business."

The following important observations were made by the Supreme Court :

(1) A Corporation is an "industry". But "industry" cannot include what are called the regal or sovereign functions of the State. The regal functions described as "primary and inalienable functions of the State" though delegated to a Corporation are necessarily excluded from the purview of the definition.[3] Such regal functions shall be confined to legislative power, administration of law and judicial power.

(2) The definition cannot be confined to trade or business or activities analogous to trade or business. If a service performed by an individual is an industry, it will continue to be so even if it is undertaken by a Corporation. It is not necessary that the service must be trade in a different garb.

(3) Neither the investment of capital, nor the existence of profit making motive is a necessary element in the modern conception of industry.[4] Monetary consideration for service is, therefore, not essential characteristic of industry in a modern State.

(4) If a service rendered by a Corporation is an "industry" the employees in that department connected with the service whether financial, administrative or

1. AIR 1957 SC 110.
2. AIR 1960 SC 675.
3. Similar observations have been made by the Supreme Court in *Madras Gymkhana Club Employees' Union* v. *Management of Gymkhana Club*, AIR 1968 SC 554.
4. *D.N. Banerjee* v. *P.R. Mukherjee*, AIR 1953 SC 58.

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executive, would be entitled to the benefit of the Act.

(5) If a department of a municipality discharges many functions, some pertaining to industry as defined in the Act, and others non-industrial activities, the predominant functions of the department shall be the criterion for the purposes of this Act.

The activity of the Octroi Department of Municipality is not an industry.[1] But the Fire Brigade service maintained by Municipal Committee is a "service" and also an 'undertaking' and, therefore, an 'industry' within the meaning of Section 2(j) of the Act.[2] A city Improvement Trust falls within the definition of industry.[3] Thus it is clear that all the departments of the Municipal Corporation are not industry. Which department is an industry and which is not, is to be determined by applying the test as laid down by the Supreme Court in the case considered above.

Is hospital an industry.—The question whether hospital is an industry or not has come for determination by the Supreme Court on a number of occasions and the uncertainty has been allowed to persist because of conflicting judicial decisions right from *Hospital Mazdoor Sabha* case to the *Bangalore Water Supply* v. *A. Rajappa*. In *State of Bombay* v. *Hospital Mazdoor Sabha*[4] case, the Hospital Mazdoor Sabha was a registered Trade Union of the employees of hospitals in the State of Bombay. The services of two of its members were terminated by way of retrenchment by the Government and the Union claimed their reinstatement through a writ petition. It was urged by the State that the writ application was misconceived because hospitals did not constitute an industry. The group of hospitals were run by the State for giving medical relief to citizens and imparting medical education. The Supreme Court held the group of hospitals to be industry and observed as follows :

(1) The State is carrying on an 'undertaking' within Section 2(j) when it runs a group of hospitals for purpose of giving medical relief to the citizens and for helping to impart medical education.

(2) An activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an undertaking.

(3) It is the character of the activity in question which attracts the provisions of Section 2(j). Who conducts the activity and whether it is conducted for profit or not make a material difference.

(4) The conventional meaning attributed to the words, 'trade and business' has lost some of its validity for the purposes of industrial adjudication...it would be erroneous to attach undue importance to attributes associated with business or trade in the popular mind in days gone by.

Applying the above principles an Ayurvedic College of Pharmacy manufacturing medicines for sale and for benefit of students of the college besides other activities of the college was held to be an industry.[5]

Hospital Mazdoor Sabha case[6] was overruled by *Safdarjung Hospital* case.[7] But

1. *Abdul Sabir Khan* v. *Municipal Council Bhandara*, 1970 Lab IC 488 (Bom).
2. *Workmen of Fire Brigade Section of the Municipal Committee, Faridabad* v. *K.I. Gosain*, AIR 1970 Punj 287.
3. *Subbramanyam and others* v. *Nagpur Improvement Trust*, (1960-61) 19 FJR 37.
4. *State of Bombay* v. *Hospital Mazdoor Sabha*, AIR 1960 SC 610 ; *See* also *Harinagar Cane Farm* v. *State of Bihar*, AIR 1964 SC 903.
5. *Lalit Hari Ayurvedic College of Pharmacy* v. *Workers Union*, AIR 1960 SC 1261.
6. *State of Bombay* v. *Hospital Mazdoor Sabha*, AIR 1960 SC 610.
7. *Management of Safdarjung Hospital, Delhi* v. *Kulbir Singh*, AIR 1970 SC 1406.

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Safdarjung Hospital and *Dhanraj Giri Hospital* cases[1] have now been overruled in *Bangalore Water Supply* v. *A. Rajappa*[2] and *Hospital Mazdoor Sabha* case has been rehabilitated. In *Management of Safdarjung Hospital, Delhi* v. *Kuldip Singh*[3] Kurji Holy Family Hospital was held not to be an industry because that was entirely charitable institution carrying on work of training, research and treatment. Similarly Safdarjung Hospital, New Delhi and Tuberculosis Hospital, New Delhi were also held not to be industry.

A group of hospitals at Bikaner attached to the Sardar Patel Medical College was held to be an industry and it was observed that the fact that hospitals are attached to the educational institution would not bring any material change in their character.[4]

In *Management of Hospitals, Orissa* v. *Their Workmen*[5] it was held that "hospital run by the Government as a part of its function is not an industry. Hospitals run by the State of Orissa are places where persons can get treated. They are run as departments of Government. The mere fact that payment is accepted in respect of some beds cannot lead to the inference that the hospitals are run as a business in a commercial way. Primarily, the hospitals are meant as free service by the Government to the patients without any profit motive".

In *Dhanrajgiri Hospital* v. *Workmen*[6] it was held that Dhanrajgiri Hospital. Solapur was not an industry because it was not carrying on any economic activity in the nature of trade or business. It was not rendering any material service by bringing in any element of trade or business in its activity. The main activity of the hospital was imparting of training in nursing and the beds in the hospital were meant for their practical training. But in view of the decision of the Supreme Court in *Bangalore Water Supply* v. *A. Rajappa*[7] *Dhanrajgiri Hospital* case has been overruled and all hospitals fulfilling the test laid down in *Bangalore Water Supply* case will be industry.

In *Keraleeya Ayurveda Samajam Hospital and Nursing Home, Shoranpur* v. *Workmen*,[8] the Ayurvedic Institution was registered under the Registration of Societies Act. It was running a hospital, nursing home and an Ayurvedic School. It was held to be an industry for the following reasons :

"(i) It was engaging employees in its different departments ; (ii) the institution where Ayurvedic-medicines were prepared was registered as a factory under the Factories Act ; (iii) for the services, rendered by way of treatment, fee was charged from citizens, and (iv) the establishment was organised in a manner in which trade or business was undertaken."

Thus on an analysis of the entire case law upto *Bangalore Water Supply* case[9] on the subject it can be said that such hospitals as are run by the Government as part of its sovereign functions with the sole object of rendering free service to the patients are not industry. But all other hospitals, both public and private ; whether charitable or commercial would be industry if they fulfil the triple test laid down in *Bangalore Water Supply* v. *A. Rajappa*.[10]

Educational Institutions.—In *University of Delhi* v. *Ram Nath*[11] the respondent

1. *Dhanrajgiri Hospital* v. *Workmen*, AIR 1975 SC 2032.
2. AIR 1978 SC 548.
3. AIR 1970 SC 1406.
4. *Hospital Employees' Union* v. *State*, AIR 1971 Raj 65.
5. AIR 1971 SC 1259.
6. AIR 1975 SC 2032.
7. AIR 1978 SC 548.
8. (1979) 1 LLJ 115 (Kerala).
9. AIR 1978 SC 548.
10. AIR 1978 SC 548.
11. AIR 1963 SC 1873.

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Mr. Ram Nath was employed as driver by University College for women. Mr. Asgar Mashih was initially employed as driver by Delhi University but was later on transferred to the University College for women in 1949. The University of Delhi found that running the busess for transporting the girl students of the women's college has resulted in loss. Therefore it decided to discontinue that facility and consequently the services of the above two drivers were terminated. The order of termination was challenged on the ground that the drivers were workmen and the termination of their services amounted to retrenchment. They demanded payment of retrenchment compensation under Section 25-F of the Act by filing petitions before the Industrial Tribunal. The Tribunal decided the matter in favour of the drivers and hence the University of Delhi challenged the validity of the award on the ground that activity carried on by the University is not industry. It was held by the Supreme Court that the work of imparting education is more a mission and a vocation than profession or trade or business and therefore University is not an industry. But this case has been overruled by the Supreme Court in *Bangalore Water Supply* case and in view of the triple test laid down in *Bangalore Water Supply*[1] case even a University would be an industry although such of its employees as are not workmen within the meaning of Section 2(s) of the Act, may not get the desired benefits to which a workman in an industry may be entitled to.

In *Brahmo Samaj Education Society* v. *West Bengal College Employees' Association*,[2] the society owned two colleges. A dispute arose between the society and non-teaching staff of the colleges. It was pleaded that the society was purely an educational institution and not an industry because there was no production of wealth with the co-operation of labour and capital as is necessary to constitute an industry. The Calcutta High Court observed that our conception of industry has not been static but has been changing with the passage of time. An undertaking which depends on the intelligence or capacity of an individual does not become an industry simply because it has a large establishment. There may be an educational institution to which pupils go because of the excellence of the teachers ; such institutions are not industry. On the other hand, there may be an institution which is so organised that it is not dependent upon the intellectual skill of any individual, but is an organisation where a number of individuals join together to render services which might even have a profit motive. Many technical institutions are run on these lines. When again we find these institutions also do business by manufacturing things or selling things and thereby making a profit they certainly come under heading of "industry". These being the tests, it is clear that it will be a question of evidence as to whether a particular institution can be said to be an industry or not.

In *Osmania University* v. *Industrial Tribunal Hyderabad*,[3] a dispute having arisen between the Osmania University and its employees, the High Court of Andhra Pradesh, after closely examining the Constitution of the University, held the dispute not to be in connection with an industry. The correct test, for ascertaining whether the particular dispute is between the capital and labour, is whether they are engaged in co-operation, or whether the dispute has arisen in activities connected directly with, or attendant upon, the production or distribution of wealth.

In *Ahmedabad Textile Industry's Research Association* v. *State of Bombay*,[4] an association was formed for founding a scientific research institute. The institute was to carry on research in connection with the textile and other allied trades to increase

1. *Bangalore Water Supply* v. *A. Rajappa*, AIR 1978 SC 548.
2. *Brahmo Samaj Education Society and others* v. *West Bengal College Employees' Association and others*, (1960) 1 LLJ 472 (Cal).
3. (1960) 1 LLJ 593 (AP).
4. AIR 1961 SC 1484.

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efficiency. The Supreme Court held that "though the association was established for the purpose of research, its main object was the benefit of the members of the association, the association is organised, and arranged in the manner in which a trade or business is generally organised ; it postulates co-operation between employers and employees ; moreover the personnel who carry on the research have no right in the result of the research. For these reasons the association was held to be "an industry".

But a society which is established with the object of catering to the intellectual as distinguished from material needs of men by promoting general knowledge of the country by conducting research and publishing various journals and books is not an industry. Even though it publishes books for sale in market, when it has no press of its own the society cannot be termed even an 'undertaking' for selling of its publication was only an ancillary activity and the employees were engaged in rendering clerical assistance in this matter just as the employees of a solicitor firm help the solicitors in giving advice and service.[1]

Since *University of Delhi* v. *Ram Nath*[2] has been overruled by the Supreme Court in *Bangalore Water Supply* v. *A. Rajappa*[3] the present position is that the educational institutions including the university are industry in a limited sense. Now those employees of educational institutions who are covered by the definition of workman under Section 2(s) of the Industrial Disputes Act, 1947 will be treated as workman of an industry.

It has been reaffirmed by the Punjab and Haryana High Court in *Sumer Chand* v. *Labour Court, Ambala and Another*[4] that university is an industry and carpenter employed in university is 'workman'. The labour Court has jurisdiction to decide the dispute relating to the termination of such a person.

It has been held in *Suresh Chandra Mathe* v. *Jiwaji University, Gwalior and others*[5] that a University is an industry and a clerk of the University is a workman.

Clubs.—Clubs or self-service institutions or non-proprietary member's club will be industry provided they fulfil the triple test laid down in *Bangalore Water Supply* v. *A. Rajappa*.[6] The *Cricket Club of India* case and *Madras Gymkhana Club* case (discussed below) which were the two leading cases, on the point so far have been over-ruled by *Bangalore Water Supply* case. In *Cricket Club of India* v. *Bombay Labour Union*[7] the question was whether the Cricket Club of India, Bombay which was a member's club and not a proprietary club, although it was incorporated as a company under the Companies Act was an industry or not. The club had membership of about 4800 and was employing 397 employees. It was held that the club was a self service institution and not an industry and "it was wrong to equate the catering facilities provided by the club to its members or their guests (members paying for that), with a hotel. The catering facility also was in the nature of self service by the club to its members". This case has now been overruled.

Madras Gymkhana Club Employees' Union v. *Management*,[8] is another case on this point. This was a member's club and not a proprietary club with a membership of about 1200. Its object was to provide a venue for sports and games and facilities for recreation and entertainment. It was running a catering department which provided food

1. *Asiatic Society* v. *State of West Bengal*, (1967) 2 LLJ 319 (Cal).
2. AIR 1963 SC 1873.
3. (1978) 2 LLJ 349 (SC).
4. (1992) 1 Lab LJ 394 (P & H).
5. (1994) 2 LLJ 462 (MP).
6. AIR 1978 SC 548.
7. AIR 1969 SC 276.
8. AIR 1968 SC 554.

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and refreshment not only generally but also on special occasion. It was held that the club was a member's self-serving institution and not an industry. No doubt the material needs or wants of a section of the community were catered but that was not enough as it was not done as part of trade or business or as an undertaking analogous to trade or business. This case has also been overruled. Now it is not necessary that the activity should be a trade or business or analogous to trade or business.[1]

It may, therefore, be submitted that both Cricket Club of India and Madras Gymkhana Club would now be an industry because they fulfil the triple test laid down in *Bangalore Water Supply* Case. Both are systematically organised with the co-operation of employer and employee for distribution of service to satisfy human wishes.[2]

Solicitor's Firm or Lawyers Office.—In *N.N.U.C. Employees* v. *Industrial Tribunal*,[3] the question was whether a solicitor's firm is an industry or not. It was held that a solicitor's firm carrying on the work of an attorney is not an industry, although specifically considered it is organised as an industrial concern. There are different categories of servants employed by a firm, each category being assigned separate duties or function. But the service rendered by a solicitor functioning either individually or working together with parties is service which is essentially individual ; it depends upon the professional equipment, knowledge and efficiency of the solicitor concerned. Subsidiary work which is purely incidental type and which is intended to assist the solicitor in doing his job has no direct relation to the professional service ultimately rendered by the solicitor. The work of his staff has no direct or essential nexus or connection with the advice which it is the duty of the solicitor to give to his client. There is, no doubt, a kind of co-operation between the solicitor and his employees, but that co-operation has no direct or immediate relation to the professional service which the the solicitor renders to his client. This case has been overruled in *Bangalore Water Supply* case[4] and now a solicitors' firm employing persons to help in catering to the needs of the clients is an industry.[5]

Agricultural operation and immovable property.—The carrying on of agricultural operations by the company for the purpose of making profits, employing workmen who contribute to the production of the agricultural commodities bringing profits to the company, was held to be an industry within the meaning of this clause.[6] Where a Sugar Mill owned a cane farm and used its produce for its own consumption and there was also evidence that the farm section of the mill was run only to feed the mill, it was held that the agricultural activity being an integral part of industrial activity, the farm section was an industry.[7]

Position of other bodies.—A Co-operative Milk Society,[8] an Oil Distribution Company,[9] a Chamber of Commerce,[10] a Partnership Firm of Accountants,[11] a Registered

1. *Bangalore Water Supply* v. *A. Rajappa*, AIR 1978 SC 548.
2. *Ibid.*
3. AIR 1962 SC 1080.
4. *Bangalore Water Supply* v. *A. Rajappa*, AIR 1978 SC 548.
5. *Ibid.*
6. *Hari Nagar Cane Farm* v. *State of Bihar*, AIR 1960 SC 903 ; also refer to *Motipur Zamindari Co. (Private) Ltd.* v. *State of Bihar and others*, (1970) 1 LLJ 634.
7. *Thiru Arcoran Sugars Ltd.* v. *Industrial Tribunal Madras*, (1970) 2 LLJ 249.
8. *Co-operative Milk Societies Union Ltd.* v. *State of West Bengal*, (1958) 2 LLJ 61 (Cal).
9. *Standard Vacuum Oil Company, Madras* v. *Gunaseelam M.G.*, (1954) 2 LLJ 656 (LAT).
10. *The Upper India Chamber of Commerce* v. *S.N. Agarwal*, (1951) 2 LLJ 200.
11. *Industrial Employer's Union U.P.* v. *Price Water House Peat and Co. Kanpur*, (1963) 2 LLJ 273.

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Association of Cloth Merchants,[1] a business of loading and unloading of goods,[2] a Book Shop,[3] a Hair Cutting Saloon,[4] Railways,[5] a Pharmacy,[6] and a Dock Labour Board[7] are all held to be industry within the meaning of the term under Section 2(j) of the Act.

It was held in *Swaraj Ashram* v. *Industrial Tribunal U.P.*[8] that for an organisation to be an industry its activity must take the nature of a business or trade etc. and there must also be co-operation of the employer and employee resulting in production of material services. If it is that it is an industry notwithstanding that its objects are charitable or that it does not make profits or even where profits are made they are not distributed among the members. Judged in this light the Swaraj Ashram, Sarvodaya Nagar, Kanpur was held to be an industry. Similarly in *Fedration of Indian Chamber of Commerce and Industry* v. *R.K. Mittal*,[9] the federation which carries on activities to assist its members and even to non-members in certain respect (for example giving them right to subscribe to their bulletein, solving their difficulties in obtaining concessions and facilities for them from the Government) was held to be an industry within the meaning of section 2(j) of the Act.

Applying the principle laid down in *Bangalore Water Supply* v. *A. Rajappa*, the Supreme Court held that Bihar Khadi Gramodyog Sangh is an industry.[10]

In *Workmen, I.S. Institution* v. *I.S. Institution*,[11] the Indian Standards Institution was a society registered under the Societies Registration Act, 1860. One of the many objects of the Institution was to prepare and promote the general adoption of standards on national and international basis relating to structures, commodities, materials, practices, operations, matters and things. Standards are technical documents describing constructional, operational and technological requirements of a material product or a process for a given purpose. Institution has several laboratories for carrying out testing operations. It maintains libraries and brings out regularly a bulletin. The workmen of the Institution made certain demands which were not accepted by the management and the dispute was referred to Industrial Tribunal for adjudication under Section 10(1)(d) and Section 12(5) of the Act. A preliminary objection was raised by the management that the Institution was not an industry. The workmen contended that the management of the Institution was carrying on an undertaking and was, therefore, an industry. Overruling objection of the management the Supreme Court held that the various activities carried on by the institution bear the character of an industry.[12] It was an activity carried on with the co-operation of employer and employees rendering material service to the society.

In *Bombay Panjrapole* v. *Workmen*,[13] main income of Bombay Panjrapole Bhuleshwar was from immovable properties, donations and sale of milk. The Managing Committee of the Trustees had decided some time back to upgrade the infirm cattle and rear them into good animals. The expenses incurred in connection with the treatment of

1. *Kanpur Kapra Committee Syndicate* v. *Registered Kapra Committee*, (1954) 1 LLJ 86.
2. *Sri Duppada Venkateswarulu* v. *Sri Seetharamaswami Naidu*, (1953) 2 LLJ 742.
3. *P.C. Dwadesh Sheni and Co.* v. *Its Workmen*, (1954) 2 LLJ 539.
4. *Central Hair Cutting Saloon* v. *Hrishikesh Pramanik*, (1961) 1 LLJ 569.
5. *Somu Kumar Chatterjee* v. *District Signal*, (1970) 2 LLJ 179.
6. *Lalit Hari Ayurvedic College Pharmacy, Pilibhit* v. *Workmen*, AIR 1960 SC 1261.
7. *Management of Dock Labour Board, Visakhapatnam* v. *Industrial Tribunal and another*, (1996) 1 Lab LJ 5 (AP).
8. AIR 1979 SC 1210.
9. AIR 1972 SC 763.
10. *Gopalji Jan Shastri and others* v. *State of Bihar*, (1983) 2 LLJ 22 (SC).
11. *Workmen, I.S. Institution* v. *I.S. Institution*, AIR 1976 SC 145 : (1976) 1 Lab LJ 33 (SC).
12. *Ibid.*
13. AIR 1971 SC 2422.

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sick and infirm animals was also negligible compared to the total expenses of the institution. These activities were held to be an industry on the following grounds :

"Their activity of maintaining cows and bulls could be considered as an investment. It was certainly carried on as a business although it was not pursued in the same way as absolute businessmen, only out to make profit, would, namely, get rid of animals which were no longer fit for any use".

In *Bhaskaran* v. *S.D.O.*,[1] the Kerala High Court held that the Post and Telegraph Department was an industry. It was further held that the Government employees, who are governed by service rules fall within the purview of the Industrial Disputes Act.

In *Om Prakash* v. *Executive Engineer S.Y.L. Canal Division Co.*[2] an interesting question arose whether the irrigation department of the State Government can be termed as an industry ? It was held that merely the fact that water is supplied by charging certain rates cannot warrant a finding that the state is indulging in trade or business activity. It is a kind of activity that cannot be left to private enterprise and therefore, this department is not an industry under this section.

But in *Des Raj etc.* v. *State of Punjab and others*,[3] the Supreme Court held that the Irrigation Department of a State is an industry. The main function of this department when subjected to the dominant nature test, evolved in *Bangalore Water Supply Board* v. *A. Rajappa case*,[4] come within the ambit of industry.

In *Soundarajan and others* v. *Secretary to Government of India, Ministry of Labour*,[5] the Ministry of Defence has two wings, namely the Defence Service and the Defence production. Ordinance factories were being run under the latter. It was held that the Ordinance depot is an industry. Merely because the Military department is run by the Central Government in the exercise of its sovereign functions, the ordinance depot will not cease to be an industry if it is severable from the other unit. Almost similar view was expressed in *Union of India* v. *Presiding Officer, Central Government Industrial Tribunal and others*,[6] by the Madhya Pradesh High Court

It was held in *Executive Engineer, National Highways* v. *Industrial Tribunal, Bhubaneshwar & Another*,[7] that regal function shall be confined to legislative power, administration of law and judicial power. In deciding whether an activity is industry or not the nature of actual function and the pattern of organised activity is decesive. Judged in this light the National Highway Division of the Works Department, if the Government is an industry as tolls and taxes are collected over the bridges constructed by the Highways Division.

It was held in *Chief Conservator of Forest & Another* v. *Jagannath Moruti Kondhare*,[8] that the scheme of work undertaken by the Forest Department could not be regarded as a sovereign function of the State. Therefore, Forest Department is an industry.

It was held in *All India Radio* v. *Santosh Kumar*[9] that All India Radio and Doordarshan carry on commercial activity for profit by getting commercial advertisements telecast or broadcast. These functions carried on by them cannot be said to be of purely sovereign nature and hence these industries within the definition of this Act. Similarly the Telecommunication Department of Union of India is also engaged in commercial activity and is not discharging any sovereign functions of State and is hence an Industry.[10]

Kamla Retreat, a place for rest and relaxation for those of the J.K. Group of Industries

1. (1982) 2 LLJ 248 (Kerala).
2. (1985) 1 LLJ 16 (P & H).
3. (1988) 2 Lab LJ 149 (SC).
4. (1978) 1 Lab LJ 349 (SC).
5. (1994) 2 LLJ 665 (Mad).
6. (1995) 1 LLJ 994 (MP).
7. (1995) 1 LLJ 470 (Orissa).
8. (1996) 1 LLJ 1223 (SC).
9. AIR 1998 SC 941.
10. AIR 1998 SC 656.

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and their guests was held to be an industry.[1]

A place of worship (Mandir) where worship is done by Pujaris on a regular wage basis and where it appears from the balance sheet that there remains a large surplus in the fund after expenses are paid for making *prasad*, it is clear that the enterprise is of commercial nature and for this reason a Mandir is an industry.[2]

It was held in *Mahamadkha Gajika Baloch* v. *Manager, Panchasara Jain Derasar*,[3] that Jain temple is an industry. In *Akhil Raj Rajya Hand Pump Mistries Sangathan Banswara and another* v. *State of Rajasthan and others*,[4] the Panchayat Samitis were providing drinking water by installing hand pump and were also arranging repairs and maintenance by engaging Hand Pump Mistries. The Panchayat Samiti was held to be an industry. So also Social Welfare Department of Government of Rajasthan,[5] and Kerala State Tourism Department[6] were also held to be industry. Similarly it has been held in *Mahesh Bhargava* v. *State of M.P. and others*,[7] that giving legal aid and legal advice are functions which any private person can and may undertake. They are not inalienable functions of the Government, necessary for governance. These functions may help to secure justice. But by exercise of those functions the Legal Aid Board does not administer justice. Functions which help to secure justice are not functions constituting administration of justice. Those functions of the Board are, therefore, in no sense sovereign functions or even instance of exercise of sovereign functions delegated to the Board by Government. The Board cannot, therefore, justly claim exemption from the scope of the definition of industry on that score.

In *R. Sreenivasa Rao* v. *Labour Court, Hyderabad and another*,[8] the National Remote Sensing Agency was held to be an industry under Section 2(j) of the Industrial Disputes Act as it does not perform any sovereign function. Some important functions of Agency relate to consultancy services of survey facilities which are non-sovereign functions.

In *Karnani Properties Ltd.* v. *State of West Bengal*,[9] the Supreme Court held that the appellant Company, a real estate company owning mansions and engaged in the activity of leasing those to tenants, which employed workers for their maintenance was an industry within the meaning of Section 2(j).

In *Dattatraya Gopal Paranjape* v. *Rashtriya Mill Mazdoor Sangh & others*,[10] the respondent trade union employed Organising and Assistant Secretaries and also clerks, accountants, peons and drivers etc. There were about 60 to 100 such employees. The services of some of them were dispensed with. It was held that keeping in view the test laid down by the Supreme Court in *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*,[11] the respondent union is an industry within the meaning of Section 2(j) of the Act. It carries on systematic activity which is organised by co-operation of the union and its employees. Trade unions satisfy more to material human wants and do not render services only to satisfy spiritual craving of workmen. There is hardly any difference between the work in the trade union employment or elsewhere in a business house.

In *Harihar Bahinipatt* v. *State of Orissa*,[12] the question arose whether the persons working as daffadars, barkandajes and ballavguidas to prepare sweets to be offered to the deities, under Sri Jagannath Temple Managing Committee were engaged in an

1. *Cotton and Woollen Textile Workers Union* v. *Industrial Tribunal*, 1982 Lab IC 1329.
2. *Workmen of M/s. Baikuntha Nath Debasthan Trust* v. *State of West Bengal & others*, (1991) 1 Lab LJ 145 (Cal).
3. (1994) 2 LLJ 1051 (SC).
4. (1994) 2 LLJ 631 (Raj).
5. *Kanhaiyalal* v. *State of Rajasthan & others*, (1994) 2 LLJ 474 (Raj).
6. *Mohanan* v. *State of Kerala*, (1994) 2 LLJ 1041 (Kerala).
7. (1994) 1 LLJ 1113 (MP).
8. (1990) 2 Lab LJ 577 (AP).
9. (1990) 4 SCC 472.
10. (1995) 2 Lab LJ 913 (Bom).
11. (1978) 1 Lab LJ 349 (SC).
12. (1965) 1 LLJ 501.

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industry. Their duty was to maintain peace, order and discipline among the pilgrims, to guard the properties of the temple and collect rents. It was held that Sri Jagannath Temple is spiritual institution and its predominant function is spiritual benefit of Hindu public who hail from all over the country, and therefore, its Managing Committee is not engaged in industry.

In *A.S. Production Agencies* v. *Industrial Tribunal Haryana*,[1] it was held that while ascertaining the amplitudes of the expression 'undertaking' in the definition of 'industry', a restricted meaning has to be assigned to it. Viewed in this light the painting section of factory was not an industry.

In *Raja Ratna Sethi* v. *Ashok Bhasin*,[2] most of the work was done by the students themselves except the work of lifting heavy things, cleaning big utensils and sweeping the vast area of campus. Applying the dominant nature test laid down in *Bangalore Water Sypply*,[3] case the court held that gurukula is not an industry.

In *Gram Panchayat* v. *Presiding Officer Labour Court, Nagpur and others*,[4] the question was whether a Pound-keeper of Village Panchayat is a workman or not. It was held that the Panchayat is statutorily required to undertake some of the Government functions. The activities in respect of those functions are not industry. The respondent who was employed as Pound keeper was only a marginal employer hired to attend certain nominal matters, that will not destroy the non-employer character of the organisation.

In *Union of India* v. *Jainarain Singh*,[5] it has been held by the Supreme Court that the Central Ground Water Board is not an industry. It may be noted that the *Bangalore Water Supply* case was not referred in this case. Similarly in *State of U.P.* v. *Arun Kumar Singh*,[6] the District Rural Development Agency which is entrusted only with the work of carrying on different schemes entrusted to it including Jawahar Rozgar Yojna was held not to be an industry. Similarly, the profession of Chartered Accountant and Auditors[7] is not an industry.

It was held in *H.K. Makwana* v. *State of Gujarat and others*,[8] that the employment offered to persons on the scarcity relief work as undertaken by the State cannot be said to be employment in "industry" as defined in Section 2(j) because it is the primary and inalienable function of the State to provide livelihood to persons who are affected by natural calamities and secondly the relief work is not a business or trade. It is not a systematic activity but is carried out casually at different places depending on the calamities in a particular area.

Amended definition of Industry

Industry.[9]—'Industry' means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contract) for the production, supply or distribution of goods or services with a view to satisfy human wants or (wishes not being wants or wishes which are merely spiritual or religious in nature), whether or not,—

1. AIR 1979 SC 170.
2. (1982) Lab IC 338.
3. (1978) 1 LLJ 349 (SC).
4. (1991) 2 Lab LJ 147 (Bom).
5. (1996) SCC (L & S) 222.
6. (1996) SCC (L & S) 197.
7. *Traser and Ross* v. *Sambasiva Iyer*, AIR 1959 Mad 134.
8. (1995) 1 LLJ 801 (Gui).
9. Substituted by Industrial Disputes (Amendment) Act, 1982. But the amended definition has not yet been enforced.

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(i) any capital has been invested for the purpose of carrying on such activity ; or

(ii) such activity is carried on with a motive to make any gain or profit, and includes—

(a) any activity of the Dock Labour Board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 ;

(b) any activity relating to the promotion of sales or business or both carried on by an establishment,

but does not include—

(1) any agricultural operation except where such "agricultural operation" is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation.—For the purposes of this sub-clause "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of Section 2 of the Plantation Labour Act, 1951 ; or

(2) hospitals or dispensaries ; or

(3) educational, scientific, research or training institutions ; or

(4) institutions owned or managed by organisation wholly or substantially engaged in any charitable, social or philanthropic service ; or

(5) khadi or village industries ; or

(6) any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space ; or

(7) any domestic service ; or

(8) any activity, being a profession practised by an individual or body of individuals, if the number of persons employed by the individual or body of individuals in relation to such profession is less than ten ; or

(9) any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals also in relation to such activity is less than ten.

The Industrial Disputes (Amendment) Act, 1982 enacts altogether a new definition of Industry. This amended definition has not been enforced till now. It nullifies the effect of many judicial decisions and attempts to clarify the conflicting views arising out of different interpretations of the word 'industry' adopted by the Supreme Court in various cases. On account of conflicting judicial decisions it had become difficult to understand the meaning of the word industry. The amended definition to a great extent incorporates the views of the Supreme Court expressed in *Bangalore Water Supply v. A. Rajappa.*[1]

(k) Industrial Dispute.—The main objective of the Act, as pointed out in the preamble is "to make provision for the investigation and settlement of industrial dispute". Therefore the definition of "industrial dispute" has special significance. The following elements should exist to constitute an industrial dispute :

(1) a dispute or difference between (a) employers and employers, or (b) employers and workmen, or (c) workmen and workmen ;

(2) the dispute or difference should be connected with (a) employment or non-employment, or (b) terms of employment, or (c) conditions of labour of

1. AIR 1978 SC 548.

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any person ;

(3) the dispute may be in relation to any workman or workmen or any other person in whom they are interested as a body.

The expression "of any person" appearing in the last line of Section 2(k) means that the person may not be a workman but he may be some one in whose employment, terms of employment or conditions of labour the workmen as a class have a true and substantial interest.[1] Industrial dispute is not restricted to dispute between employer and a recognised majority union. It also means a difference between employer and workmen including a minority union.[2]

The definition of industrial dispute does not refer to industry. But on the grammar of the expression it must necessarily be a dispute in an industry. Moreover, the expression the 'employer' and 'workman' used in the definition of industrial dispute carry the requirement of 'industry' in that definition by virtue of their own defition.[3] Before an industrial dispute can be raised there must be first established a relationship of employer and employee associating together, the former following a trade or business, etc., and the latter following any calling, service or employment, etc., in aid of the employee's enterprise. It is not necessary that there must be a profit motive but the enterprise must be analogous to trade or business in a commercial sense.[4] For a dispute to be industrial dispute it is necessary that a demand must be first raised on management and rejected by them. Making of such a demand to conciliation officer and its communication by him to management who reject the same is not sufficient to constitute industrial dispute.[5]

For coming into existence of an industrial dispute a written demand is not a *sine qua non*, unless of course in the case of public utility service. The very words in the definition of industrial dispute in Section 2(k) are 'dispute or difference'. The term 'industrial dispute' connotes a real and substantial difference having some element of persistency and continuity till resolved and likely, if not adjusted, to endanger the industrial peace of the undertaking or the community.[6]

In *Workmen of Hindustan Lever Ltd.* v. *Hindustan Lever Ltd.*,[7] the question was whether a demand to confirm employees in an acting capacity in a grade is an industrial dispute ? It was held that a demand of the workmen to confirm employees employed in an acting capacity in a grade would unquestionably be an industrial dispute without anything more.

It was held in *Sarva Shramik Sangh* v. *Indian Hume Pipe Company Limited*,[8] that the Industrial Disputes Act, 1947 does not limit the power of the Industrial Tribunal to grant relief only from the date of raising of industrial dispute. The definition of the industrial dispute in Section 2(k) of the Act does not contain any such limitation. The Tribunal has power to grant relief from a date anterior to the date of raising industrial dispute.

Employment and non-employment.—Non-employment includes retrenchment as well as refusal to reinstate.[9] The use of the word 'non-employment' raises question, whether an employee who had been dismissed, removed, discharged or retrenched can

1. *Workmen of Dimakuchi Tea Estate* v. *Management of Dimakuchi Tea Estate*, AIR 1958 SC 353.
2. *Tata Chemicals* v. *Workmen, Tata Chemicals*, AIR 1978 SC 828.
3. *Workmen I.S. Institution* v. *I.S. Institution*, AIR 1976 SC 145.
4. *Management of Safdar Jung Hospital, New Delhi* v. *Kuldip Singh*, AIR 1970 SC 1407.
5. *Fedders Lloyd Corporation Ltd.* v. *Lt. Governor Delhi*, AIR 1970 Delhi 60.
6. *Shambhu Nath* v. *Bank of Baroda*, AIR 1978 SC 1088.
7. (1984) 2 LLJ 391 (SC).
8. (1993) 1 Lab LJ 965 (SC).
9. *Fedders Lloyd Corporation Ltd.* v. *Lt. Governor, Delhi*, AIR 1970 Delhi 60.

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be re-instated by an order of the Industrial Tribunal. In *Western India Automobile Association* v. *Industrial Tribunal*,[1] the Federal Court held that :

"Re-instatement is connected with non-employment and is, therefore, within the words of the definition. It would be curious result if the view is taken that though a person discharged during a dispute is within the definition of the word 'workman' yet if he raises a dispute about dismissal and re-instatement it would be outside the words of the definition in connection with employment or non-employment."

Dispute relating to workmen employed by the contractor.—*The Standard Vaccum Company* case[2] is the leading case on the point. The Standard Vacuum Company used to give annual contract for maintenance of the plant and premises. In the first year 67 persons were employed while the next year only 40 workmen were employed. The contractor's men were not entitled to any privileges and there was no security of employment. The workmen raised an industrial dispute demanding the abolition of the contract system. The Supreme Court held the dispute to be an industrial dispute because there was a real and substantial dispute between the company and the workmen on the question of employment of contract labour for the work of the company.[3] The fact that the workmen were employed by the contractor would not alter the nature of the dispute so long as the party raising the dispute has a direct interest in the subject-matter of the dispute. A dispute about the reason for stoppage of work[4] or a dispute relating to application and interpretation of standing orders is also an industrial dispute.[5]

In *K.K. Thilakan and others* v. *FACT Ltd., and another*[6] 26 persons were employed by the contractor, Pigee Agencies in connection with the work of the respondent a public sector undertaking. After about 10 years of service they claimed to be absorbed in service under the Respondent No. 1. It was held that the petitioners were never the workmen of the respondent but were only now seeking employment. An industrial dispute cannot exist between an employer and person seeking employment. Here the petitioners were employed by a contractor employed by the first respondent. That cannot confer on them any preferential claim to be appointed in its service.

Disputes regarding medical aid to families or housing of workmen.—In any industrial dispute, Tribunal has jurisdiction to make proper and reasonable order, but housing of the industrial labour is primarily the responsibility of the State, and in the present economic conditions of our industries, an obligation to provide housing accommodation to the employees cannot be imposed upon the employers.[7] The Tribunal may also make an award for medical aid to the families of employees, although there is no authoritative judicial opinion on this point.

Privilege.—Where privilege given to an office-bearer of a trade union in the form of duty relief is withdrawn by the management which has granted the privilege, it cannot be said that an industrial dispute has arisen thereby. The legal status of the duty relief is only that of a concession and not a matter pertaining to conditions of service. Where the concession provided is withdrawn, the beneficiary cannot complain that a condition of service is affected and the management is not entitled to do so without raising an industrial dispute and having the matter adjudicated by the competent

1. AIR 1949 FC 111.
2. *Standard Vacuum Refining Company of India Ltd.* v. *Their Workmen & another*, (1960) 2 Lab LJ 233.
3. *Ibid.*
4. *Management of Radio Foundation Engineering* v. *State of Bihar*, AIR 1970 Pat 265.
5. *Chipping and Painting Employers Association, Bombay* v. *A.T. Zambre*, AIR 1969 Bom 274.
6. (1992) 2 LLJ 782 (Kerala).
7. *Patna Electric Supply Company Ltd.* v. *Patna Electric Supply Workers Union*, AIR 1959 SC 1035.

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authority.[1]

Delay in raising industrial dispute.—Delay in raising industrial dispute does not serve as a bar to the reference of a dispute. If the dispute is raised after a considerable delay which is not reasonably explained, the Tribunal would definitely take that fact into account while dealing with the merits of the dispute.[2]

Individual dispute and industrial dispute.—Whether a single workman, who is agrrieved by an action of the employer can raise industrial dispute.[3] Section 2(k) of the Act speaks of a dispute between employer and workmen *i.e.*, plural form has been used. "Before insertion of Section 2-A of the Act an individual dispute could not *per se* be an industrial dispute, but it could become one if taken up by the Trade Union or a number of workmen. The provision of the Act leads to the conclusion that its applicability to an individual dispute as opposed to dispute involving a group of workmen is excluded unless it acquires the general characteristics of an industrial dispute, *viz.*, the workmen as a body or a considerable section of them make common cause with the individual workman".[4]

It was held in *Jagdish Narain Sharma and another* v. *Rajasthan Patrika Ltd. and another*,[5] that a dispute relating to transfer of a workman will become an industrial dispute only when it is espoused by a union of workmen or by a substantial number of workmen employed in an industry. Without such espousal the dispute cannot be treated as an industrial dispute and cannot be referred to a Labour Court.

Section 2-A is of limited application. It does not declare all individual disputes to be an industrial dispute. A dispute connected with a discharged, dismissed, retrenched or terminated workman shall be an industrial dispute. If the dispute or difference is connected with other matter then it would have to satisfy the test laid down in judicial decisions. Thus only a collective dispute could constitute an industrial dispute but collective dispute does not mean that the dispute should either be sponsored by a recognised union or that all or majority of the workmen of an industrial establishment should be parties to it.[6] A dispute is an industrial dispute even where it is sponsored by a union which is not registered ; but the Trade Union must not be one unconnected with the employer or the industry concerned.[7] Where an individual dispute is espoused by union the question of the employee being a member of the union when the cause arose is immaterial.[8] Those taking up the cause of the aggrieved workman must be in the same employment, *i.e.*, there must be community of interest when the act complained against happened and not when the dispute was referred to.[9] But even if there is a community of interest between workman and a person who is not a workman the question of non-employment of the latter cannot form the subject-matter of an industrial dispute.[10] In order to make a dispute industrial dispute it is not necessary that there should be a resolution of substantial or appreciable number of workmen. What is necessary is that there must be some expression of "collective will" of substantial or appreciable number of workmen taking up the cause of the aggrieved workman.[11] A maximum of 18 per

1. *Workmen of Indian Bank* v. *Management of Indian Bank*, (1985) 1 LLJ 6 (Mad).
2. *Guest Keen William (Private) Ltd.* v. *Sterling (P.J.) and others*, AIR 1959 SC 1279.
3. *Newspaper Ltd.* v. *State Industrial U.P. and others*, AIR 1957 SC 532.
4. *Ibid.*
5. (1994) 2 LLJ 600 (Raj).
6. *State of Bihar* v. *Kripa Shanker Jaiswal*, AIR 1961 SC 304.
7. *Express Newspapers (Private) Ltd.* v. *First Labour Court, West Bengal & others*, (1959-60) 17 FJR 413 (Cal).
8. *Western India Watch Co. Ltd.* v. *Western India Watch Co. Workers Union*, AIR 1970 SC 1205.
9. *Shamsuddin* v. *State of Kerala & others*, (1961) 1 LLJ 77.
10. *The Workmen* v. *The Management of Jawahar Mills Ltd.*, (1970) 1 MLJ 433.
11. *Mrs. P. Soma Sundaram* v. *Labour Court*, (1970) 1 LLJ 558 (AP).

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cent employees including dismissed employees supporting individual dispute were considered not sufficient to convert it into industrial dispute.[1] From this it appears that the workman must be a member of the sponsoring union on the date of dispute. Once a dispute has been referred, it will not cease to be an industrial dispute because the workmen withdrew their support afterwards.[2]

In *Workmen of Indian Express Newspapers Ltd.* v. *Management of Indian Express Newspapers*[3] a dispute relating to two workmen of Indian Express Newspapers Ltd. was espoused by the Delhi Union of journalists which was an outside union. About 25 per cent of the working journalists of the Indian Express were members of that union. But there was no union of the journalists of the Indian Express. It was held that the Delhi Union of journalists could be said to have a representative character *qua* the working journalists employed in Indian Express and the dispute was thus transformed into an industrial dispute. Where an industrial dispute existed at the time of making order of reference this dispute does not cease to be so merely because dispute relating to only one employee is left over and that the union which raised the dispute chooses not to represent a particular employee.[4]

(ka) Industrial establishment or undertaking.—'Industrial establishment or undertaking' means an establishment or undertaking in which any industry is carried on :

Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then—

(a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking ;

(b) if the predominant activity or such of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activities carried on in such establishment or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking.

(kk) Insurance Company.—Section 2(kk) provides that "insurance company" means an insurance company as defined in Section 2 of the Insurance Act, 1938, having branches or other establishments in more than one State.

This definition has two essential ingredients, namely :

(i) it should be an insurance company as defined in Section 2 of the Insurance Act ; and

(ii) it should have branches or other establishments in more than one State.

Under the Insurance Act, an Insurance Company means any insurer being a Company. Association of Partnership which may be wound up under the Indian Companies Act, 1913, or to which the Indian Partnership Act, 1932 applies.

(kka) Khadi.—"Khadi" has the meaning assigned to it in clause (d) of Section 2 of the Khadi and Village Industries Commission Act, 1956.

(kkb) Labour Court.—"Labour Court" means a Labour Court constituted under

1. *State of Punjab* v. *Gondhara Transport Co. (P) Ltd.*, (1969) 36 FJR 66 (Punj).
2. *Working Journalist of Hindu, Madras* v. *The Hindu, Madras and others*, (1960) 1 LLJ 228.
3. AIR 1970 SC 737.
4. *Binny Limited* v. *Their Workmen*, AIR 1972 SC 1975.

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Section 7 of the Industrial Disputes Act, 1947.

(kkk) Lay-off.—The following are salient features of lay off :

(1) An employer, who is willing to employ, fails or refuses or is unable to provide employment for reasons beyond his control.

(2) Any such failure or refusal to employ a workman may be on account of :—

(i) shortage of coal, power, or raw materials, or

(ii) the accumulation of stock, or

(iii) the breakdown of machinery, or

(iv) natural calamity, or

(v) any other connected reasons.

(3) A workman who is so deprived of employment must be such whose name is borne on the muster rolls of his industrial establishment.

(4) The workman must not have been retrenched.

Explanation.—The explanation attached to the sub-section lays down that every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause.

If the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during the second half for the day and is given employment, then, he shall be deemed to have been laid-off only for one-half of that day.

If he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day.

Meaning of lay-off.—Lay-off means putting aside workmen temporarily. The duration of lay-off should not be for a period longer than the period of emergency. The employer-employee relationship does not come to an end but is merely suspended during the period of emergency.

Failure, refusal or inability.—In *Central India Spinning, Weaving and Manufacturing Co. Ltd., Nagpur* v. *State Industrial Court*,[1] the Bombay High Court held that the key to the definition is to be found in the words "the failure, refusal or inability of an employer". These words make it clear that the unemployment has to be on account of a cause which is independent of any action or inaction on the part of the workmen themselves.

For any other reason.—The expression "for any other reason" appearing in this sub-section has to be construed *ejusdem generis*. Any other reason must be of the kind, as the other reasons stated in the clause. The common feature of all these reasons is that the workmen are laid off for reasons beyond the control of the employer. Therefore, the expression "for any other reason" must also denote similar characteristics.

Right and obligations resulting from lay-off.—Lay-off is not a right conferred but an obligation imposed on the employer for the benefit of the workmen.[2] Far from laying off of an employee being a right, it is really an obligation.[3] The very essence of a lay-off is that it is a temporary stoppage and that within a reasonable period of time the employer expects that, the business or industry would continue and his employees

1. (1959) 1 LLJ 468 (Bom).
2. *M.A. Veiyra* v. *C.P. Fernandes and another*, AIR 1957 Bom 100.
3. *Ibid.*

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who have been laid-off will be restored to their full rights as employees.[1] Further, in the definition of lay-off there is no indication whatever that it should continue for a particular period of time.[2]

In *Nutan Mills Ltd., Ahmeadbad* v. *Employees' State Insurance Corporation*[3] the question for consideration was, whether on the employee being laid-off the relation of master and servant continues and the mutual rights and obligations which flow from such relationship also continue. The High Court of Bombay was of the opinion that the relationship of master and servant did not continue but was suspended during the period of lay-off and the employee entitled to any wages. It was further held that :

> "If the contract is not suspended and if the mutual obligation between the employer and the employee continues, then the mere fact that the employee is not given work or cannot render service to the employer will not derogate from his right to receive wages from the employer. A subsisting contract of employment results in there being certain obligations upon the employer and also upon the employee and also certain rights as between the employer and the employee. The obligations are that the employer is bound to pay wages and the employee is bound to serve. The rights are that the employer is entitled to claim from employee that he should render services. The right of the employee is that if he is prepared to serve he would have the right to receive the wages stipulated. But if the contract of employment is suspended, then there is no obligation upon the employee to serve the employer, nor is there a reciprocal obligation upon the employer to pay wages."

(l) Lock-out.—"Lock-out" means the closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him.

Strike is a weapon in the hands of the labour to force the management to accept their demands. Similarly, lock-out is a weapon in the hands of the management to coerce the labour to come down in their demands relating to the conditions of employment. Lock-out is the keeping of labour away from work by an employer with a view to resist their claim. There are four ingredients of lock-out :

(1) (i) temporary closing of a place of employment by the employer, or
(ii) suspension of work by the employer, or
(iii) refusal by an employer to continue to employ any number of persons employed by him ;

(2) the above-mentioned acts of the employer should be motivated by coercion ;
(3) an industry as defined in the Act ; and
(4) a dispute in such industry.

Lock-cut has been described by the Supreme Court as the antithesis of strike.[4] In view of Madras High Court, whatever be the circumstances in which the employer may find himself placed and whatever be the strength of the agencies which forced on him the step and however impotent he may be to avoid the result, if an employer closes the place of employment or suspends work on his premises, a lock-out would come into existence.[5] It was further held that in the constant tussle of employees and employer the strike is the weapon of the employees.....lock-out is the corresponding weapon in the armoury of the employer. If the employer shuts down his place of business as a means

1. *M.A. Veiyra* v. *C.P. Fernandes and another*, AIR 1957 Bom 100.
2. *Ibid.*
3. AIR 1956 Bom 336.
4. *Kairbetta Estate Kotagiri* v. *Raja Manickam*, AIR 1963 SC 893.
5. *Shri Ramchandra Spinning Mills* v. *State of Madras*, AIR 1956 Mad 241.

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of reprisal or as an instrument of coercion or as a mode of exerting pressure on the employees or generally speaking when his act is what may be called an act of belligerency there would be a lock-out.[1]

In case of lock-out the workmen are asked by the employer to keep away from work, and, therefore, they are not under any obligation to present themselves for work.[2] The question whether the lock-out by the employer is justified would be an industrial dispute under the Act, and therefore, the question of the payment of wages during the period of a lock-out would also be an industrial dispute.[3]

Difference between lock-out and lay-off.—(1) Lock-out is an act on the part of the employer taken to coerce or pressurise the labour ; lay-off is for trade reasons beyond the control of the employer, *i.e.*, it is not intentional act.

(2) Lock-out is due to an industrial dispute and continues during the period of dispute ; lay-off is not concerned with a dispute with the workmen.

Difference between lock-out and retrenchment.—(1) Lock-out is temporary, retrenchment is permanent.

(2) In lock-out the relationship of employer and employee is only suspended, it does not come to an end ; in retrenchment such a relationship is severed at the instance of the employer.

(3) Lock-out is with a motive to coerce the workmen ; the intention of retrenchment is to dispense with surplus labour.

(4) Lock-out is due to and during an industrial dispute, whereas in case of retrenchment, there is no such dispute.

Difference between lock-out and closure.—(1) Lock-out is temporary ; closure is permanent.

(2) Lock-out is a weapon of coercion in the hands of employer ; closure is generally for trade reasons.

(3) Lock-out is during an industrial dispute ; while in case of closure there need not be any dispute.

Above-mentioned differences may provide some clue as to difference between lock-out and closure but these are not precise differences. In order to determine whether the employer has imposed lock-out or closed the establishment it is not necessary that the closure has to be irrevocable, final and permanent and the lock-out is temporary or for a period. True test to be applied on the basis of evidence is whether the closure was a device or pretence to terminate services of the workmen or whether it was *bona fide* and for reasons beyond the control of the employer. Duration of closure may be significant fact to determine the intention and *bona fides* of the employer at the time of closure but is not decisive of the matter.[4]

(Ia) Major Port.—'Major Port' means a port as defined in clause 8 of Section 3 of the Indian Port Act, 1903. As defined in the above clause 'Major Port' means "any port which the Central Government may by notification in the Official Gazette declare, or may by any law for the time being in force have declared to be a major port".

(Ib) Mine.—Mine means a mine as defined in clause (j) of sub-section (1) of Section 2 of the Mines Act, 1952. According to this cluase 'Mine' means "any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on, and includes, unless exempted by the Central Government by notification in the Official Gazette, any premises or part thereof on

1. *Shri Ramchandra Spinning Mills* v. *State of Madras*, AIR 1956 Mad 241.
2. *Workmen of Itakhoolie Tea Estate* v. *The Management*, 1952 LAC 343.
3. *Indian Paper Pulp Co. Ltd.* v. *Indian Paper Pulp Workers' Union*, AIR 1949 FC 148.
4. *General Labour Union (Red Flag), Bombay* v. *B.V. Chavan and others*, (1985) 1 LLJ 82 (SC).

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which any process ancillary to the getting, dressing or preparation for sale of mineral or of coke is being carried on".

(II) National Tribunal.—"National Tribunal" means a National Industrial Tribunal constituted under Section 7-B of the Act.

(III) Office-Bearer.—'Office-bearer' in the relation to a Trade Union includes any member of the executive thereof, but does not include an auditor.

(m) Prescribed.—"Prescribed" means prescribed by rules made under this Act.

(n) Public Utility Service.—The following are public utility services under the Act :

(i) any railway service ;
(ii) any transport service for the carriage of passengers or goods by air ;
(iii) any service in or in connection with the working of any major port or dock ;
(iv) any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends ;
(v) any postal, telegraph or telephone service ;
(vi) any industry which supplies power, light or water to the public ;
(vii) any system of public conservancy or sanitation ;
(viii) any industry specified in the First Schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification :

Provided that the period so specified shall not in the first instance, exceed six months but may, by a like notification, be extended from time to time, by any period not exceeding six months at any one time if in the opinion of the appropriate Government public emergency or public interest requires such extension.

The industries enumerated in the First Schedule are : (1) Transport (other than railway) for the carriage of passengers or goods by land or water ; (2) Banking ; (3) Cement ; (4) Coal ; (5) Cotton Textiles ; (6) Food Stuffs ; (7) Iron and Steel ; (8) Defence establishments ; (9) Service in hospitals and dispensaries ; (10) Fire Brigade Service ; (11) India Government Mints ; (12) India Security Press ; (13) Copper Mining ; (14) Lead Mining ; (15) Zinc Mining ; (16) Iron ore Mining ; and (17) Service in any oil field.

The declaration of any service as public utility service by the appropriate Government as per Schedule I presupposes the existence of industry. Hence service in hospitals and dispensaries contemplated by item 9 of Schedule I can be declared to be a public utility service only if they satisfy the test of industry.[1]

In *Saxby & Farmer (India)* v. *Workmen*,[2] the appellant Company was a unit of Engineering Industry engaged in production of equipments for the railways. It was declared a public utility service. The management curtailed unpaid festival holidays as the system of unpaid holidays was no longer followed in any major industry of the region. It was held that there should be more concentration on increase of production and efficiency than enjoying the holidays if the country is to march ahead on the road to prosperity. As such there was no reason or justification for unpaid holidays not being curtailed.

(o) Railway Company.—A "Railway Company" means a Railway Company as defined in Section 8 of the Indian Railways Act, 1890. Section 3(5) of the Indian

1. *Management of Safdar Jung Hospital, Delhi* v. *Kuldip Singh*, AIR 1970 SC 1407.
2. AIR 1975 SC 534.

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Railways Act states :

" 'Railway Company' includes any person whether incorporated or not who are owners or lessees of a railway or parties to any agreement for working a Railway".

The expression "Railway" is defined in Section 3(4) of the Indian Railways Act as follows :

" 'Railway' means a railway, or any portion of a railway, for the public carriage of passengers, animals or goods, and includes :

(a) All land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway ;

(b) All lines of rails, siding or branches worked over for the purposes of or in connection with a railway ;

(c) All stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery and other works constructed for the purpose of or in connection with a railway ; and

(d) All ferries, ships, boats and rafts which are used on inland waters for the purposes of traffic of railway and belong to or are hired or worked by the authority administering the railways."

(oo) Retrenchment.—Retrenchment connotes in its ordinary acceptation that the business itself is being continued, but that a portion of the staff of labour force is discharged as surplusage.[1] It means the discharge of surplus labour or staff by the employer for any reason whatsoever.[2] The order of termination must be actuated with a motive of economy. Section 2(oo) which defines the term "retrenchment" may be analysed as follows :

(1) Retrenchment means the termination by the employer of the service of a workman ;

(2) The termination may be for any reason whatsoever ;

(3) But the termination should not be as a measure of punishment by way of disciplinary action.

The following are not retrenchment :

(a) voluntary retirement of a workman, or

(b) retirement of a workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf ; or

(bb) termination of the service of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein, or

(c) termination of the service of a workman on the ground of continued ill-health.

For any reason whatsoever.—Action taken by the employer may be for any reason. When a portion of the staff or labour force is discharged as surplusage in a running or continuing business, termination of service which follows may be due to a variety of reasons, *e.g.*, economy, rationalisation in industry, installation of a new labour saving machinery etc.[3] It does not matter why the employer is discharging the surplusage. If other requirements of the definition are fulfilled, then it is retrenchment. "For any reason whatsoever" are the key words. Every termination spells retrenchment.

1. *Piparaich Sugar Mills Ltd.* v. *Piparaich Sugar Mills Mazdoor Union*, AIR 1957 SC 95.
2. *Harprasad Shiv Shankar* v. *A.D. Diwekar*, AIR 1957 SC 121.
3. *Piparaich Sugar Mills Ltd.* v. *Piparaich Sugar Mills Mazdoor Union*, AIR 1957 SC 95.

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A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term.[1]

The termination of service on account of superannuation at a particular age which is prescribed by the rules which constitute the condition of service cannot be regarded as retrenchment.[2] Retrenchment means the discharge of surplus labour by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. It has no application where the service of all workmen have been terminated by the employer on a real and *bona fide* closure of business or on the undertaking being taken over by another employer.[3] The discharge of surplus labour must be in running industry. The termination of service in accordance with rules of service is not retrenchment,[4] but the termination of service in terms of contract of employment is retrenchment.[5]

For what reasons and at what time the employer would discharge the surplus labour, is entirely his discretion. If a reorganisation scheme has been adopted by the company for reasons of economy and conveniece, the discharge and retrenchment of some of the workmen would have been considered as an inevitable though very unfortunate consequence of the reorganization scheme which the employer acting *bona fide* was entitled to adopt.[6]

In *D.C. & G. Mills* v. *Shambhu Nath*,[7] the respondent was working as a Motion-Setter at the relevant time. There was some reorganisation in the establishment and the post of Motion Setter was abolished. Thereafter the respondent would have been retrenched but in terms of a settlement between the management and the workmen, no employee was retrenched. The management agreed to offer work "on any other suitable post". Therefore the respondent was offered an alternative job without loss of wages. He was found unfit for that job even after extension of probation. Thereafter, he was offered another job on the same wages, which he did not accept. Instead he requested the management to give him one more chance to show his efficiency. His name was struck-off as the management did not accept his request: It was held that the striking off name of the respondent amounted to retrenchment. Retrenchment would include termination of services of a temporary railway servant on one month's notice.[8]

In *Morinda Co-op. Suger Mill Ltd.* v. *Ram Kishan & others*,[9] workmen were employed in sugar mills during crushing season only and consequent to closure of season, they ceased to work. It was held that such cessation of work would not amount to retrenchment since it is only a seasonal work.

In *Kamlesh Kumar Rajanikant Mehta* v. *Presiding Officer Central Government Industrial Tribunal No. 1 and others*,[10] the question was : where the services of an employee is terminated for loss of confidence, will it amount to retrenchment. It was held that retrenchment is merely the discharge of surplus labour staff in a running or continuing business or industry, for certain reasons, *viz.*, cutting down of expenditure or wanting to introduce labour saving device. If the termination is for any other reason say for loss of confidence, it is not retrenchment. It would be a mistake to hold that loss of

1. *State Bank* v. *N.S. Money*, AIR 1976 SC 1111 ; *Hindustan Steel* v. *Labour Courts Orissa*, AIR 1977 SC 31.
2. *State of Gujarat* v. *P.R. Manked*, 1969 Lab IC 21 (Guj).
3. *Duryodhan Naik* v. *Union of India*, AIR 1969 Lab IC 1282 (Orissa).
4. *Surjit Kantha* v. *Union of India*, AIR 1970 Assam 131.
5. *Hindustan Steel Ltd.* v. *State of Orissa*, 1970 Lab IC 345 (Orissa).
6. *D. Marcopollo and Co. (Private) Ltd.* v. *Their Employees' Union*, AIR 1956 SC 1012.
7. AIR 1978 SC 8.
8. *Malkhan Singh* v. *Union of India*, (1981) 2 LLJ 174.
9. (1996) 1 LLJ 870 (SC).
10. (1980) 1 LLJ 336 (Bom).

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confidence could be included in the expression "for any reason whatsoever" and termination on that score would amount to retrenchment.

It was held in *Sh. Satya Prakash Giri & others* v. *Presiding Officer, Industrial Tribunal, Haryana and another*[1] that it is settled law that it is the managerial discretion of an employer to organise his business in the manner he considers best. It is not competent for a workman to challenge the propriety of the same so long as the business is organised in a *bona fide* manner. While reorganising the business, if surplus employees are asked to quit, no employer can be burdened with carrying on with an economic dead weight and retrenchment has to be accepted as inevitable.

Where the services of a workman is terminated due to loss of confidence such termination amounts to punishment inflicted by way of disciplinary action. Since termination is grounded upon conduct attaching stigma to the appellant, disciplinary proceedings are necessary as a condition precedent to infliction of termination as a measure of punishment. If no disciplinary proceedings are held the order of termination would be vitiated in law and cannot be sustained. In such a situation he can either be reinstated in service or be adequately compensated.[2] Hence termination on the ground of loss of confidence would not amount to retrenchment.[3]

In *Santosh Gupta* v. *State Bank of India*,[4] an employee of the bank was discharged on the ground that she failed to pass the prescribed test provided for confirmation in service. She had put in more than 240 days service in a year (although with breaks). The Tribunal held that the termination did not amount to retrenchment. The Supreme Court directing her reinstatement with full back wages held that such termination of service would amount to retrenchment. The expression "termination of service for any reason whatsoever" is wide enough so as to include every kind of termination of service of a workman by act of the employer excepting those which are expressly excluded by the proviso to the definition of the word 'retrenchment'.

Termination of service of an employee either during the initial period of probation or during the extended period of probation on the ground that they were not found suitable amounts to retrenchment.[5] But this view has been overruled by the Supreme Court in *M. Venugopal* v. *L.I.C. of India, A.P. and another*,[6] wherein the Supreme Court held that the termination of service of the probationer cannot be said to be a retrenchment within the meaning of Section 2(oo) because his confirmation was dependant on fulfilment of minimum business guarantee and the employee failed to fulfil the norm prescribed. He was asked to improve his performance before the expiry of extended period of probation. Since he failed to fulfil the minimum prescribed, the L.I.C. was justified in terminating his service without complying with the provisions of the Act relating to retrenchment.

In *M/s. Gammon India Ltd.* v. *Sri Niranjan Dass*,[7] the services of senior clerks were terminated due to reduction in the volume of business of the Company as a result of rescission in work. It was held to be a case of retrenchment because the termination does not fall in any of the three excluded categories.

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1. (1995) 1 LLJ 437 (P & H).
2. *Chandulal* v. *The Management of M/s. Pan American World Airways Inc.*, (1985) 2 LLJ 181 (SC).
3. *Kamal Kishore Lakshman* v. *The Management of M/s. Pan American World Airways Inc. and others*, (1987) 1 Lab LJ 107 (SC).
4. (1980) 2 LLJ 72 (SC).
5. *Management Karanataka State Road Transport Corpn., Bangalore* v. *Shek Abdul Khader and others*, (1984) 1 LLJ 110 (SC).
6. (1994) 1 LLJ 597 (SC) ; this case was followed in *Arvind Kumar* v. *Deputy Director (Admn.) Rajiv Krishi Upsadan Mandi Parishad*, (1995) 1 LLJ 750 (All).
7. (1984) 1 LLJ 233 (SC).

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In *Binoy Kumar Chatterjee* v. *Jugantar Ltd. and others*,[1] the appellant was in the employment of M/s. Jugantar Ltd. and retired on completing the age of 60 years. After retirement he was offered fresh employment by the same employer for a period of 12 months under a contract. On the expiry of the period of 12 months he raised a dispute alleging that his service had been wrongly terminated. The Supreme Court in appeal, observed that when a workman retires at the age of superannuation it works the end point of workman's service. If he is employed afresh thereafter for a term, such employment cannot be regarded as employment contemplated within the definition of the expression "retirement". The termination of employee's services on the expiry of the period of his contract does not fall within the expression "retrenchment" in Section 2(oo) of the Industrial Disputes Act.

In *Post Graduate Institute of Medical Education and Research* v. *Presiding Officer Labour Court and Another*,[2] the second respondent namely Bhupinder Singh was appointed as a Junior Laboratory Technician on an ad-hoc basis against a post reserved for Scheduled Tribe, from December, 1985 till March 1986. The appointment was continued from time to time but not after October 1988. A dispute arose and was referred to the Labour Court which held the termination illegal and directed reinstatement with full back wages and continuity of service, the award was challenged and it was held by the High Court that the appointment was not purely contractual one which could be terminated by the employer on the expiry of the contractual period and it did not come within the purview of clause (bb) of Section 2(oo). As it was to a post reserved for the Schedule Tribe, it was not proper to discontinue the second respondent's service until a Schedule Tribe candidate was recommended by the Employment Exchange or the Selection Committee of the Institute. The appeal was, therefore, dismissed.

In *L. Robert D'Souza* v. *Executive Engineer Southern Railway*,[3] it was held that the termination for unauthorised absence from duty by workman amounted to retrenchment. Similarly termination of service in accordance with the standing orders of the Company for continued absence without leave was retrenchment.[4] The position relating to retrenchment was expressed in explicit terms in a Patna case. The High Court has held that whether the termination is brought about by voluntary or involuntary actions, whether that was produced by overt act or by operation of the provisions of the standing orders, the termination would be retrenchment.[5]

However in *Arun Kumar Mathur* v. *Labour Court and another*[6] the name of the petitioner was struck off the muster roll on the ground of continued absence for a short period. It was held that the petitioner's case does not fall within the exception to Section 2(oo). He has neither voluntarily retired nor has reached the age of superannuation. It is also not a case of voluntary abandonment. Even though it is treated as such voluntary abandonment does not fall within exceptions to Section 2(oo). Hence the workman was entitled to relief as his services were terminated without following Section 25-F of the Act. The case was remitted back to Labour Court to determine appropriate relief.

In Uptron India Ltd. v. Shammi Bhan,[7] the respondent was a permanent employee of Uptron India Ltd. Mrs. Shammi Bhan was on maternity leave with effect from 7th November, 1984 to 29th January, 1985 and had thereafter allegedly overstayed the standing orders provided that of the employee overstays the leave without permission for more than seven days his services would be liable to automatic termination. Her services were terminated by mere issuing a letter as per above certified standing orders. It was held by the Supreme Court that in view of non-compliance with other legal requirements the termination of her services amounts to retrenchment.

1. (1983) 2 LLJ 8 (SC).
2. (1996) 1 LLJ 406 (P & H).
3. (1982) Lab IC 811 : (1981) 1 LLJ 330 (SC).
4. *Naresh Chandra Das* v. *Seventh Industrial Tribunal*, (1982) 2 LLJ 64 (Cal).
5. *Deshraj Sood* v. *Industrial Tribunal and others*, (1985) 1 LLJ 74 (Patna).
6. (1994) 2 LLJ 370 (All).
7. AIR 1998 SC 1681.

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It was held in *J.K. Cotton Spinning and Weaving Mills Co. Ltd.* v. *State of U.P.*,[1] that when an employee voluntarily tendered his resignation which was accepted by the management, such termination did not fall within the meaning of retrenchment in Section 2(s) of the U.P. Industrial Disputes Act but amounted to voluntary retirement.

In *S. Govindaraju* v. *K.S.R.T.C. and Anothers*,[2] the appellant was duly selected for conductor's post according to Regulations. He was appointed in a temporary vacancy and later on his services were terminated on the ground of his being found unsuitable. No opinion was expressed by the Supreme Court whether it would amount to retrenchment or not. But it was held that once a candidate is selected in accordance with the regulations, he gets right to be considered for appointment as and when vacancy arises. On the removal of his name serious consequences entail as he forfeits his right to employment in future. In such a situation, even though the regulations do not stipulate for affording any opportunity to the employee the principles of natural justice would be attracted and the employee would be entitled to an opportunity of explanation though no elaborate enquiry would be necessary.

In *State of Rajasthan & others* v. *Rameshwar Lal Gohlot*,[3] a person was appointed on January 28, 1988 for a period of 3 months or till regularly selected candidate assumes office. His appointment was terminated on November 19, 1988. It was held that when the appointment is for a fixed period, unless there is finding that power under Clause (bb) of Section 2(oo) was misused or vitiated by its *mala fide* exercise, it cannot be held that the termination is illegal. In its absence, the employer could terminate the services in terms of the letter of appointment unless it is colourable exercise of power. Therefore in case of termination of services is in terms of letter of appointment neither reinstatement nor fresh appointment could be made nor payment of backwages could be ordered.

In *Punjab Land Development and Reclamation Corporation Ltd.* v. *Presiding Officer, Labour Court*,[4] the question was whether retrenchment under the Act meant termination of the services of the workmen as surplus labour for any reason whatever or it meant termination by the employer of the services of the workmen for any reason whatsoever otherwise than as punishment inflicted by way of disciplinary action and those expressly excluded by the definition. After reviewing its earlier decisions the Court held that the latter view was correct one. The Court observed that had the Parliament "envisaged only the question of termination of surplus labour alone in mind", there would be no question of excluding cases falling in sub-clauses (a), (b) and (c) of the definition. In the opinion of the Court the insertion of exclusion clause (bb) by the Amending Act of 1984 is also in line with this view.

In *Mithilesh Kumar Singh* v. *State of Bihar and others*,[5] the services of a workman working in Public Works Department was terminated on the ground that the initial appointment was not legal and valid. It was held that termination even on the ground that the initial appointment was not legal and valid amounts to retrenchment because such a termination is not included in the exception to retrenchment under Section 2(oo) of the Industrial Disputes Act.

Continued ill-health.—Health does not necessarily mean absence of organic disease ; if a person is infirm or not sound either in body or in mind or soul, he cannot be said to possess health.[6] Ill-health obviously means disease, physical defect or infirmity or unsoundness. A person who is not free from infirmity or disease, or is not possessing a sound health for active duties is said to be of ill-health. If this state of health continues for a long period, he may be said to be suffering from continued

1. (1991) 1 Lab LJ 39 (SC).
2. (1986) 2 Lab LJ 351 (SC).
3. (1996) 1 LLJ 888 (SC).
4. (1990) 3 SCC 682.
5. (1995) 1 Lab LJ 1015 (Patna).
6. *Burrakur Coal Company Ltd.* v. *Azimuddin Ashraf and another*, (1960) 2 LLJ 434 (Patna).

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ill-health.[1]

In *Lalit Mohan Puri* v. *Pure Drinks (New Delhi) Ltd.*,[2] the employer asked a heavy vehicle driver to appear before E.S.I. Doctor to prove ill-health. The workman refused to do so and his services were terminated without inquiry on the ground of continued ill-health. On a reference the Labour Court upheld order of termination by reason of presumption against workman. It was held by the Delhi High Court that the employer cannot act on the basis of presumption and the termination of services of the workman merely because he refused to appear for medical examination to prove ill-health was illegal.

Contract Employment.—It was held in *Dilip Hanuman Shirke* v. *Zilla Parishad Yavatmal*,[3] that the exception clause (bb) to Section 2(oo) has to be construed strictly as it takes away certain rights of workmen which they have been enjoying prior to the amendment. Sub-clause (bb) covers termination of employment either because of non-renewal of the contract or because of expiry of time stipulated in the contract of employment but the possibility of the employer exploiting the labour by giving fixed term employment even when a vacancy or post exists can never be ruled out. Therefore, it would be unwise and improper simply to decide the nature of employment on the basis of letter of appointment issued by the employer. Nature of employment will have to be determined with reference to the nature of duties performed by the workman and the type of job the workman was entrusted with. The amended clause (bb) would apply only to such cases where the work ceases or the post itself ceases to exist or such other analogous cases where the contract of employment is found to be fair, proper and *bona fide*.

In *Vadodara Municipal Corporation* v. *Gajendra R. Dhumal*,[4] Mr. Gajendra was appointed as Assistant Draftsman in 1981 for a fixed term and on the expiry of that term the workman continued to work. Thereafter his appointment was made for a fixed term with retrospective effect. It was held that the services of the workman on the expiry of first fixed term did not come to an end automatically but the workman was continued to work without any order. Once the appointment ceased to be a fixed term, subsequent issue of an order giving a fixed term appointment with retrospective effect will not be covered by clause (bb) of Section 2(oo). In this case after his initial appointment as Draftsman, the workman was appointed on a lower post of tracer. This was done by wrongly terminating his services without following the conditions of Chapter V-A of the Industrial Disputes Act. Such termination was held to be retrenchment.

In *The Haryana State Federation of Consumers Co-operative Wholesale Store Ltd., Chandigarh* v. *Presiding Officer, Industrial Tribunal-cum-Labour Court Hissar and another*,[5] second respondent was appointed on 9 February, 1984 by the petitioner as a salesman for a period of 89 days on *ad hoc* basis. The appointment was extended from time to time and finally his appointment was extended on his request for the period from August 4, 1984 to January 30, 1987 on a fixed salary. Thereafter his services stood terminated. It was held that when a person is employed for doing a particular work or for a specified duration of time, the termination may come out automatically on the completion of the work or the expiry of the period. Similarly a person may be employed on a specified condition that he has to achieve a particular target in a specified time and in case of failure to do so, his appoitment shall stand automatically terminated. In all these cases termination may not amount to retrenchment. But in this case the second

1. *Burrakur Coal Company Ltd.* v. *Azimuddin Ashraf and another*, (1960) 2 LLJ 434 (Patna).
2. (1992) 2 Lab LJ 439 (Delhi).
3. (1990) 1 Lab LJ 445 (Bom).
4. (1996) 1 Lab LJ 206 (Guj).
5. (1995) 2 Lab LJ 1094 (P & H).

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respondent had not been appointed for executing a project nor were his services terminated at the expiry of initial period of employment. In fact he had continued in service on account of a series of extension orders. The post held by him was not abolished. In view of these facts it was held that the order of the Labour Court reinstating the workman with continuity of service and full back wages needs no interference.

Difference between Retrenchment and closure

(1) Retrenchment affects only some of the workmen, whereas closure affects all workmen.

(2) In retrenchment the trade or business remains uninterrupted as it continues ; while in closure the business itself is discontinued.

(p) Settlement.—The definition of the term "settlement" as given in Section 2(p) of the Act may be analysed into the following ingredients :

(1) It is a settlement arrived at in the course of conciliation proceeding. A conciliation proceeding may be held by a conciliation officer or Board of Conciliation under this Act.

(2) It also includes a written agreement between the employer and workman arrived at otherwise than in the course of conciliation proceeding. Such a written agreement must be signed by the parties to the agreement in the prescribed manner. A copy of the agreement must also be sent to an officer authorised in this behalf by the Appropriate Government and the Concilation Officer.

The definition of settlement envisages two categories of settlements. One is a settlement which is arrived at in the course of a conciliation proceedings and the second is a written agreement between employer and workmen arrived at otherwise than in the course of conciliation proceeding.[1] Where a settlement was arrived at between the management and the association of workmen in presence of the conciliation officer, the settlement must be regarded as one made by the association in its representative character and, therefore, was binding on the workmen.[2]

Unless the office bearers who signed the agreement were authorised by the Executive Committee of the union to enter into a settlement or the constitution of union contained a provision that one or more of its members would be competent to settle dispute with the management, no agreement between any office bearer of the union and the management can be called a settlement.[3]

Where the representative union acts in exercise of the powers conferred by Section 20(2) of Maharashtra Recognition of Trade Union and Prevention of Unfair Practices Act, 1971 it is obligatory upon it to act in a manner as not to discriminate between its members and other workmen of the undertaking who are not its members. However, when a settlement is reached in a proceeding under the Industrial Disputes Act in which a representative union has appeared, the same is binding on all the workmen of the undertaking. This would mean that neither the representative union nor the employer can discriminate between members of the representative union and other workmen who are not members. The benefits, advantages and disadvantages or liabilities arising out of a settlement in any proceeding under the Industrial Disputes Act, to which the representative union is a party shall be equally applicable to each workman in the

1. *Tata Chemicals* v. *Workmen Tata Chemicals*, AIR 1978 SC 828 ; *See* also *New Standard Engg. Co.* v. *N.L. Abhyankar*, AIR 1978 SC 982.
2. *The Workmen of Motor Industries Company Ltd.* v. *The Management of Motor Industries Co. Ltd.*, AIR 1969 SC 1880.
3. *Brooke Bond India Ltd.* v. *Workmen*, (1981) 2 LLJ 184 (SC)

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undertaking. There shall not be a slightest trace of discrimination between members and non-members both in regard to the advantages, and as regard the obligations and liabilities.[1]

In *Bachi Singh and another* v. *Union of India and another*,[2] the dispute between the union and the management was settled by the agreement arrived at before the Conciliation Officer wherein it was stated that the Minister had assured his good offices for the implementation of the demands and on this assurance the federation called off its agitation. It was held that it is not a settlement and the petitioners may approach the authorities for reference of dispute under the Act.

(q) **Strike.**—Strike means :

(1) cessation of work by a body of persons employed in any industry acting in combination ; or

(2) a concerted refusal of any number of persons who are or have been employed in any industry to continue to work or to accept employment ; or

(3) a refusal under a common understanding of any number of persons who are or have been employed in industry to continue to work or to accept employment.

Strike means the stoppage of work by a body of workmen acting in concert with a view to bring pressure upon the employer to concede to their demands during an industrial dispute. The workmen must be employed in any industry. Mere cessation of work does not come within the purview of strike unless it can be shown that such cessation of work was a concerted action for the enforcement of an industrial demand.[3]

As pointed out in this clause a cessation of work or refusal to work is an essential element of strike. There can be no strike if there is no cessation of work. However, the duration of cessation of work is immaterial. Cessation of work even for half an hour amounts to a strike.[4] What is required, therefore, is actual cessation of work for howsoever short a period it may be. Mere absence from work is not enough but there must be concerted refusal to work, to constitute a strike.[5] The workers of a company wanted to celebrate "May day". They requested the employer of company to declare that day a holiday. They were also ready to compensate the loss of work by working on a Sunday. On the Company's failure to declare 'May day' as a holiday the workers enbloc applied for leave. It was held that there was no "cessation of work" or concerted refusal to work and the action of the employees to apply for casual leave enbloc did not amount to strike.[6]

Kinds of Strike.—There are mainly three kinds of strike, namely, (1) general strike ; (2) stay-in-strike ; and (3) go slow.

(1) General Strike.—A General strike is one, where the workmen join together for common cause and stay away from work, depriving the employer of their labour needed to run his factory. Token strike is also a kind of general strike. Token strike is for a day or a few hours or for a short duration because its main object is to draw the attention of the employer by demonstrating the solidarity and co-operation of the employees. General strike is for a longer period. It is generally resorted to when employees fail to achieve their object by other means including a token strike which generally precedes a general strike.

1. *Balmer Lawrie Worker's Union Bombay and another* v. *Balmer Lawrie and Company Ltd. and others*, (1995) 1 LLJ 314 (SC).
2. (1993) 2 LLJ 643 (SC).
3. *Indian Iron and Steel Co. Ltd.* v. *Its Workmen*, (1967) 1 LLJ 381 (Pat).
4. *Patiala Cement Co. Ltd.* v. *Certain Workers*, (1955) 2 LLJ 57 (LAT).
5. *Ram Sarup and another* v. *Rex*, AIR 1949 All 218.
6. *Standard Aluminium Co.* v. *Madras Gunasekaran*, MG (1954) 2 LLJ 1956 (LAT).

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(2) **Stay-in-Strike.**—A 'Stay-in-Strike' is also known as 'tools-down-strike' or 'pens-down-strike'. It is that form of strike where the workmen report to their duties, occupy the premises but do not work. The employer is thus prevented from employing other labour to carry on his business. Where dismissed workmen were staying on premises and refused to leave them it was held not to amount to stay in strike but an offence of criminal trespass.[1] The presence of excited labour in the factory is a great threat and danger. The Supreme Court has held that refusal under common understanding to continue to work is a strike and if in pursuance of such common understanding the employees entered the premises of the Bank and refused to take their pens in their hands that would no doubt be a strike under Section 2(q).[2]

(3) **Go-Slow.**—In a "go-slow" strike, the workmen do not stay away from work, they do come to their work and work also, but with a slow speed in order to lower down the production and thereby cause loss to the employer. Go-slow strike is not a "strike" within the meaning of the term in the Act, but is serious misconduct which is insidious in its nature and cannot be countenanced.[3]

In addition to these three forms of strike which are frequently resorted to by the industrial workers, a few more may be cited although some of them are not strike within the meaning of sub-section 2(q).

(i) **Sympathetic Strike.**—A sympathetic strike is resorted to in sympathy of other striking workmen. Its aim is to encourage or to extend moral support to or indirectly to aid the striking workmen. The sympathisers resorting to such strike have no demand or grievance of their own. It was held in *Kambalingam* v. *Indian Metallurgical Corporation, Madras*,[4] that when the workers in concert absent themselves out of sympathy to some cause wholly unrelated to their employment or even in regard to condition of employment of other workers in service under other management, such absence could not be held to be strike as the essential element of the intention to use it against the management is absent. The management would, therefore, be entitled to take disciplinary proceedings against the workmen for their absence on the ground of breach of condition of service.

(ii) **Hunger Strike.**—In hunger strike a group of workmen resort to fasting on or near the place of work or the residence of the employer with a view to coerce the employer to accept their demands. In *Piparaich Sugar Mills Ltd.* v. *Their Workmen*,[5] certain employees who held key positions in the Mill resorted to hunger strike at the residence of the Managing Director, with the result that even those workmen who reported to their duties could not be given work. It was held that the concerted action of the workmen who went on hunger strike amounted to strike within the meaning of this sub-section.

(iii) **Work to rule.**—The employees in case of "work to rule" strictly adhere to the rules while performing their duties which ordinarily they do not observe. Thus strict observance of rules results in slowing down the tempo of work, causes inconvenience to the public and embarrassment to the employer. It is no strike because there is no stoppage of work at all.

(qq) **Trade Union.**—"Trade Union" means a trade union registered under the Trade Unions Act, 1926.

(r) **Tribunal.**—Section 2(r) of the Act states that the "Tribunal" means an Industrial Tribunal constituted under Section 7-A of the Act. It also includes an

1. *Mysore Machinery Manufacturers* v. *State*, AIR 1966 Mys 51.
2. *Punjab National Bank Ltd.* v. *Their Workmen*, AIR 1960 SC 160.
3. *Sasa Musa Sugar Works (Private) Ltd.* v. *Shobrati Khan and others*, AIR 1959 SC 923.
4. (1964) 1 LLJ 81.
5. AIR 1960 SC 1258.

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Industrial Tribunal constituted before 10th March, 1957 under this Act.

(ra) Unfair Labour Practice.—"Unfair Labour Practice" means any of the practices specified in the Fifth Schedule.

(rb) Village Industries.—"Village Industries" has the meaning assigned to it in clause (h) of Section 2 of the Khadi and Village Industries Commission Act, 1956.

(rr) Wages.—"Wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied were fulfilled, be payable to a workman in respect of his employment or of work done in such employment. Wages also includes :

(i) such allowance (including dearness allowance) as the workman is for the time being entitled to ;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles ;

(iii) any travelling concession ;

(iv) any commission payable on the promotion of the sales or business or both.

But the following are not wages—

(a) any bonus ;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for benefit of the workman under any law for the time being in force ;

(c) any gratuity payable on the termination of service of workman.

Proper Wages.—To determine the proper basic wages of a workman a comparison with the rates obtaining in similar business of the locality is useful. If after paying such wages the company is unable to make any profit, that may be a consideration for the company deciding to wind up ; the apprehension that the company may have to close the business cannot be said to affect the proper scale of pay.[1] Scale of pay should be determined after taking into consideration the nature of the work done, the capacity of the industry to pay and other similar factors ; whether the employer is able to make pofit or not has no bearing on the question of proper wages of a workman.[2]

So far as fair wages is concerned, while the lower limit must be the minimum wage, the upper limit is said to be the 'capacity of the industry to pay'. The capacity of the industry to pay should be gauged on an industry-cum-region basis, after taking a fair cross-section of that industry and in a given case, it may be even permissible to divide industry into appropriate classes and then deal with the capacity of the industry to pay classwise.[3] Where an employee is given car allowance and benefit of telephone and newspapers, these must be taken into consideration in fixation of fair wages as they were allowed to him to reduce the expenditure which would otherwise has gone into his family budget.[4]

In fixation of wages where there are no comparable concerns in the same industry and if there are any, they are newly started one, it has been held that the industry-cum-region formula cannot be applied.[5] In such cases wage structure of other similar industries in the same region should be taken into consideration. But wages paid in same industry in other parts of the country should not be considered. A casual worker

1. *Rajamani Transport Ltd.* v. *Its Workmen*, AIR 1953 Mad 342.
2. *Ibid.*
3. *Workmen of Shri Bajrang Jute Mills Ltd.* v. *Employer of Shri Bajrang Jute Mills Ltd.*, AIR 1970 SC 78.
4. *Bennet Coleman and Co.* v. *Punya Priyadas*, AIR 1970 SC 426.
5. *Workmen of Orient Papers Mills Ltd.* v. *Orient Paper Mills Ltd.*, AIR 1969 SC 976.

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cannot expect the same wages as permanent employee.[1]

No workman can claim extra allowance from the employer for his travelling expenses from his residence to work place when he shifts his residence unless there is a contract to the effect.[2] Similarly, the employee cannot establish a claim when the employer in the exercise of his inherent right into choose his place of business shifts the same to another distant place. Shifting of business is not transferring the employees.

It was held in *Siemens Ltd, Thane* v. *Gajanar Vithal Konde and others*,[3] that a Labour Court has no jurisdiction to entertain a claim for wages during a period of lock-out under Section 33-C (2) of the Act. Amount payable to the workmen during illegal or unjustified strike or lock-out does not amount to 'wages' within the meaning of Section 2(rr).

Over Time.—The Bihar Shops and Establishments Act provides that a workman can be asked to work for a maximum of 48 hours a week. If a workman is asked to work for more than 48 hours, then the employer has to pay double the rate of ordinary wages for work done over and above 48 hours. In a case a workman under the conditions of his service was required to work 39 hours a week, but could be asked to work beyond 39 hours but not exceeding 48 hours a week. In this case the Supreme Court has held that the the provisions of the Bihar Act do not govern payment of over-time by the employer because the maximum hours of work are governed by the conditions of service prevailing in his establishment.[4] Therefore, any workman asked to work beyond 39 hours would be working over-time and the company would be expected to pay him compensation for such over-time work, not at ordinary rates but at a rate higher than that. If the company pays only at the ordinary rates that is not extra-compensation for work done beyond agreed hours and in that case the company would be indirectly increasing the hours of work and consequently altering the condition of service.[5]

Dearness Allowance.—Dearness Allowance depends upon the place of posting of an employee. In a case where the flat and steamer clerks had no definite place of posting because of their plying in the river, it was held that their place of posting shall be the place where their families are residing.[6] In view of the Supreme Court, all categories of staff getting the same wages and posted at one place should be given the same scale of dearness allowance irrespective of the fact that they are working as clerks or members of subordinate staff or factory workmen.[7] It was further said that the pressure of high prices is the same on various categories of employees and the subordinate staff and factory workmen these days are as keen to educate their children as clerical staff.[8]

On an analysis of the various cases decided by the Supreme Court, the following principles can be laid down, which are to be kept in view while determining any question of payment of dearness allowance or revision of dearness allowance :

(1) Normally full neutralisation is not given except to the very lowest of employees.[9] It has been held that in matters of grant of dearness allowance except to the very lowest-class of manual labourer whose income is just insufficient to keep body and soul together, it is unwise to neutralise the entire rise in cost of living by dearness

1. *Workmen of Orient Papers Mills Ltd.* v. *Orient Paper Mills Ltd.*, AIR 1969 SC 976.
2. *Shalimar Paint* v. *Third Industrial Tribunal*, AIR 1971 Cal 90.
3. (1993) 1 Lab LJ 635 (Bombay).
4. *Indian Oxygen Ltd.* v. *Their Workmen*, AIR 1969 SC 306.
5. *Ibid.*
6. *Indian General Navigation and Railway Co. Ltd. Calcutta* v. *Their Workmen*, AIR 1960 SC 286.
7. *Greaves Cotton and Co. Ltd.* v. *Their Workmen*, AIR 1964 SC 689.
8. *Ibid.*
9. *Bengal Chemical and Pharmaceutical Works Ltd.* v. *Its Workmen*, AIR 1969 SC 360.

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allowance.[1]

(2) The basis of fixation of wages and dearness allowance is industry-cum-region formula. This formula is necessary, first to avoid unfair competition between an establishment and another, and secondly, diversity in wages in the region may not lead to industrial unrest. But only similar units should be compared because while disparity in wages in similar industries leads to discontent, any attempt to level up wages without making sufficient allowance for the differences leads to hardship.[2] While selecting comparable concerns in the region the Industrial Tribunal should bear in mind that the selected concerns are as nearly similar to the line of business carried on by the factory as possible. The selected concern should not be disproportionately larger than the factory.[3] The following facts should be kept in view to determine the desirability to compare one concern with another[4] :

(i) Total capital invested by the concern ;
(ii) Extent of its business ;
(iii) Order of the profits made by the concern ;
(iv) Dividends paid ;
(v) Number of employees employed in the concern ;
(vi) Standing of the concern in industry to which it belongs ;
(vii) Extent of their customers ;[5]
(viii) Losses and other relevant considerations.[6]

For fixing basic wages and dearness allowance industrial adjudication some times leans on the industry part of the industry-cum-region formula and at other times on the region part of that formula. In this connection it is further said that where there are a large number of industrial concerns of the same kind in the same region greater emphasis should be put on industry part of the formula as this will put all concerns almost on an equal footing in the matter of production cost.[7] Where the number a comparable concerns is small in particular region, the region part of the principle becomes more important because there would not be much competition. The region part of the industry-cum-region formula requires that comparable concerns should nearly be similar to the line of business carried on by the employer before industrial adjudication.[8]

(3) The additional financial burden which a revision of the wage structure or dearness allowance would impose upon an employer and his ability to bear such burden are very material and relevant factors to be taken into account.[9]

(4) One hundred per cent neutralisation is not considered proper because it may lead to inflation.[10]

(5) Employees getting the same wages should get the same dearness allowance irrespective of whether they are working as clerks or members of subordinate staff or factory workmen.[11]

(6) When demand for revision of dearness allowance is made and rise in the cost of living support to such demand is proved, the claim has to be considered on its

1. *Clerks of Calcutta Tramways* v. *Calcutta Tramways Co. Ltd.*, AIR 1957 SC 78.
2. *Kamani Metals and Alloys Ltd.* v. *Their Workmen*, AIR 1967 SC 1175.
3. *Woolcombers of India* v. *Their Workers Union*, AIR 1973 SC 2758.
4. *Workmen of Balmer Lawrie and Co. Ltd.* v. *Balmer Lawrie and Co. Ltd.*, AIR 1964 SC 728.
5. *Woolcombers of India* v. *Their Workers Union*, AIR 1973 SC 2758.
6. *Ibid.*
7. *Greaves Cotton and Co.* v. *Their Workmen*, AIR 1968 SC 689.
8. *French Motor Car Co. Ltd.* v. *Workmen*, AIR 1963 SC 1327.
9. *Bengal Chemical and Pharmaceutical Works Ltd.* v. *Its Workmen*, AIR 1969 SC 360.
10. *Kamani Metals and Alloys Ltd.* v. *Their Workmen*, AIR 1967 SC 1175.
11. *Greaves Cotton and Co.* v. *Their Workmen*, AIR 1967 SC 689.

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merits.[1]

(7) It is solely the discretion of the tribunal to decide from which date its award should come into operation.[2] Therefore, when a tribunal gives a direction regarding the date from which the award has to become effective, no question of principle as such is involved.[3] It shall be competent for the tribunal to make the award operative from the date of demand or the date of reference or the date earlier than the date of reference but after the date of demand.

Bonus.—Bonus is a kind of cash payment in addition to wages. It is an incentive to the workers given conditionally on attaining a particular standard of efficiency. To justify any demand for bonus two conditions must be satisfied, namely, (a) the wages fell short of the living standard, and (b) the industry made huge profits due to the joint contribution of the capital and labour. Therefore, in case of loss to the industry, there seems no justification in any demand for bonus.[4]

The following principles may be relevant to determine any question relating to bonus :

(1) Bonus is not an *ex gratia* payment, for it has been recognised that a claim for bonus, if resisted, gives rise to an industrial dispute which has to be settled by a duly constituted Industrial Court or Tribunal. The difference between bonus and wages is that the former does not rest on contract but still payments are made because they are legally due but which the parties do not contemplate to continue indefinitely.

(2) Where the industry has capacity to pay, and has been so established that its capacity to pay may be counted up continuously, payment of "living wages" is desirable. But where the industry has no such capacity or its capacity varies or is expected to vary from year to year, so that the industry cannot afford to pay living wages bonus must be looked upon as the temporary satisfaction, wholly or in part, of the needs of the employees.

(3) Capital and labour jointly contribute to the earning of any industrial concern. Therefore, the labour must get some benefit if there is a surplus after meeting necessary charges, *viz.*, sum necessary for rehabilitation, replacement and modernisation of the machinery reserves, etc., paying due consideration to the needs of the employees, claims of share-holders and requirements of industry.

(4) Essentially the amount of bonus must depend upon the relative prosperity of any concern during the year in question. The prosperity of any concern is reflected in the amount of residuary surplus. The need of labour at existing wages is also an important consideration.

Production Bonus Scheme.—The production bonus scheme may be extended to those employees of a manufacturing company who make the articles and also to those who sell them. It would be unreasonable to say that those employees who only sell them are not entitled to production bonus. It is true that just as a man who makes an article by using different materials in such a way as to make them more suitable to satisfy the people's wants, is engaged in productive labour, so also is the person or persons who help in the ultimate achievement of satisfaction of those wants by bringing them to the consumer's reach.[5]

Fixation of wages.—In fixing the proper wage scale the following factors should

1. *Remington Rand of India* v. *Its Workmen*, (1962) 1 LLJ 287 (SC).
2. *Hydro Engineers Private Ltd.* v. *Their Workmen*, AIR 1969 SC 182.
3. *Bengal Chemical and Pharmaceutical Works Ltd.* v. *Its Workmen*, AIR 1969 SC 360.
4. *Millowners Association Bombay* v. *Rashtriya Mill Mazdoor Sangh*, 1952 LAC 433.
5. *Western India Match Co. Ltd.* v. *Their Workmen*, AIR 1964 SC 472.

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be taken into account :

(1) work load, *i.e.*, the hours of work ;

(2) the need of the workmen ;

(3) the financial resources of the employer ;

(4) the rates of wages prevailing in other industries in the same region.

(s) **Workman.**—The definition of workman is important because the Act aims at investigation and settlement of industrial dispute which implies a difference between employer and workmen. Therefore a tribunal has right to adjudicate an industrial dispute only when such a dispute relates to an employee who is a workman.

"Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act, in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute.

"Workman" does not include any such person—

(i) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957 ; or

(ii) who is employed in the police service or as an officer or other employee of a prison ; or

(iii) who is employed mainly in a managerial or administrative capacity ; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

The expression "employed" used in the definition has two known connotations. The context would indicate that it is used in the sense of a relationship brought about by express or implied contract of service in which the employee renders services for which he is engaged by the employer and the latter agrees to pay him in cash or kind as agreed between them or statutorily prescribed. It discloses a relationship of command and obedience. The essential condition of a person being a workman within the terms of the definition is that he should be employed to do the work in the industry and that there should be an employment of his by the employer and that there should be a relationship between the employer and him as between the employer and employee or master and servant. Unless a person is thus, employed there can be no question of his being a workman within the definition. Thus where a contractor employs a workman to do the work which he contracted with a third person to accomplish, the workman of the contractor would not without something more become a workman of that third person.[1]

In *Bihar State Road Transport Corporation* v. *State of Bihar*,[2] a person was appointed as head clerk in the office of Divisional Manager and there was no evidence that he was doing managerial or supervisory work. His conditions of service were governed by the standing orders of the Rajya Transport. He was held to be a workman. It was held in *B.S.O.S. & D. Co.* v. *Management Staff Assam*,[3] that a person cannot be assumed to be a workman on the ground that he does not come within the four exceptions in Section 2(s). In practice quite a large number of employees are employed

1. *The Workmen of the Food Corporation of India* v. *M/s. Food Corporation of India*, (1985) 2 LLJ 4 (SC).
2. AIR 1970 SC 1217.
3. AIR 1971 SC 922.

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in industries to do work of more than one of the kinds mentioned in the definition. In such cases workman must be held to be employed to do that work which is the main work he is required to do even though he may be incidentally doing other type of work.[1] An Accountant of a Bank cannot be said to have been employed mainly in a managerial or administrative capacity because of the fact that he used to sign salary bills of staff.[2]

In *Punjab National Bank* v. *Ghulam Dastagir*,[3] the respondent was personal driver of area manager of the appellant Bank. Area manager was given personal allowance by bank to enable him to employ personal driver of his own jeep. All requirements in maintaining jeep were borne by the bank. There was no material to show that the said driver was employed by the bank, was paid his salary by bank and was included in the list of employees of the bank. It was held that the driver was not employed by the bank and was not a workman within Section 2(s) of the Act. In *Venkataraman* v. *Labour Court*,[4] the Kerala High Court held that a teacher in school was not a workman.

In *S.K. Verma* v. *Mahesh Chandra*,[5] the Development Officer of Life Insurance Corporation was held to be a workman. Keeping in view the nature of duties performed by such officers and the powers vested in them they cannot be said to be engaged in any administrative or managerial work.

In *Ved Prakash Gupta* v. *Messrs Detton Cables India (P) Ltd.*,[6] the appellant was employed as a Security Inspector at the gate of the factory premises. He was held to be a workman within this section because the duty of the appellant was neither managerial nor supervisory in nature in the sense in which these terms are understood in industrial law.

In *H.S. Chauhan* v. *Life Insurance Corporation of India*,[7] a Development Officer was held to be a workman. He had to perform routine, manual, mechanical and clercial duties and was drawing wages exceeding Rs. 500/-. He had no supervisory duty. He could neither appoint any person nor remove anybody. He had no power to assign duties or distribute work to any employee.

In *Titaghur Papers Mills Co. Ltd.* v. *Ist Industrial Tribunal*,[8] a person with technical expertise was also held to be a workman. Although they did not run the machines themselves but stood by and guarded ordinary workmen in the matter of running the machine, their job cannot be said to be purely supervisory or administrative.

In *Arkal Govind Raj Rao* v. *Ciba Geigy of India Ltd., Bombay*,[9] a Stenographer-cum-Accountant working in the respondent organisation was appointed as Assistant and was designated as Group Leader. He was looking after the work of two other members of the group and has to ensure that work attached to group is completed in time. He was also preparing bank reconciliation statements and directing other clerks to note some documents and report to him. He was categorised as 'Covenanted Contractual Staff Cadre' and salary paid to him was different from clerk. The employee concerned was held to be a workman and it was held that when an employee has multifarious duties, the primary and basic duties will determine whether he was a workman or not. When an employee is incidentally asked to do some other work which may not necessarily be in tune with the basic duties, such additional duties cannot

1. AIR 1971 SC 922.
2. *Punjab Co-op. Bank Ltd.* v. *R.S. Bhatia*, AIR 1957 SC 1898..
3. AIR 1978 SC 481.
4. (1982) 1 LLJ 454 ; *See* also *Muthayyan* v. *Manager, Kadalur Estate*, (1982) 1 LLJ 23.
5. (1983) 2 LLJ 429 (SC).
6. (1984) 1 LLJ 546 (SC).
7. (1982) Lab IC 1864.
8. (1982) 2 LLJ 288 (Cal).
9. (1985) 2 Lab LJ 401 (SC).

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change the character and status of that employee. It was further pointed out that the definition of workman clearly shows that the person concerned would not cease to be a workman if he performs some supervisory duties. He would not be workman only if he was engaged in supervisory capacity. Incidental performance of supervisory duties would not make the appellant a person employed in supervisory capacity. Performing certain supervisory duties in addition to his normal duties of a clerk, preparing bank reconciliation statement, difference in salary and categorising the employee as 'Covenanted Contractual Staff Cadre' would not bring about any substantial change in the status of the employee concerned.

It was held in *J. Philips* v. *Labour Court, Hyderabad and another*,[1] that designation alone is not important to determine whether a person is working in a supervisory capacity or is a workman. The test to decide whether an employee is a workman is to take into account his basic or primary duties and the dominant purpose of his employment. An incidental performance of supervisory duty will not make the character of employment supervisory. The focus shall be on the nature of the duties.

A clerk who has been given the assistance of a peon cannot be said to be working in a supervisory capacity. Similarly giving training by chief analytical chemist to an apprentice as part of his work by itself would not be supervisory.[2] A clerk in a Bank is a workman.[3] In *Kerala State Coil Corporation Ltd.* v. *Industrial Tribunal and others*,[4] the factory requisitioned different companies to supply security personnel to work in factory who were paid by the companies which sent them to work in factory. It was held that such security men are workmen of factory which requisitioned them.

In *Miss A. Sundarambal* v. *Government of Goa, Daman and Diu*,[5] it was held that in order to be a workman an employee should be employed to do any skilled or unskilled, manual, supervisory, technical or clerical work. Judged in this light a teacher cannot be called a workman.

In *Dattatraya Gopal Paranjape* v. *Rashtriya Mill Mazdoor Sangh and others*,[6] the question for consideration was whether the organising and Assistant Secretaries of the respondent union were workmen within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. It was held that the word "skilled" used in Section 2(s) of the Act calls for more attributes of manual dexterity than intellectual dexterity. For otherwise, it would mean whatever the avocation, a person would necessarily be skilled. Every avocation requires some skill. Hence it cannot be accepted that Assistant Secrectaries who were carrying on the function of trade unionists are carrying out for a hire or reward so as to fall within the scope of Section 2(s). They cannot also be said to have been employed in the operational capacity as trade unionists. Therefore they are not workmen within the meaning of Section 2(s) of the Industrial Disputes Act, 1987.

In *H.R. Adyanthaya* v. *Sounders (India) Ltd.*,[7] the question was whether medical representatives perform duties of skilled and technical nature and are as such workman. It was held that the word skilled has to be construed *ejusdem generis* and thus construed would mean skilled work, whether manual or non-manual, which is of a genere of the other types of work mentioned in the definition clause 2(s). The work of promotion of sales of products of services of the establishment is distinct from and independent of,

1. (1994) 2 LLJ 750 (AP).
2. *S.B. Kulkarni* v. *India Red Cross Society*, (1988) 1 LLJ 411 (Bombay).
3. *S. Rajendran* v. *Asst. General Manager, State Bank of Travancore and other*, (1995) 1 LLJ 650 (Kerala).
4. (1995) 1 LLJ 951 (Kerala).
5. (1989) 1 Lab LJ 61 (SC).
6. (1995) 2 Lab LJ 913 (Bom).
7. (1995) 1 LLJ 303 (SC).

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the types of work covered by Section 2(s). Therefore medical representatives are not workmen.

In *Madikal Service Co-op. Bank Ltd.* v. *Labour Court, Kozhikode*[1] it was held that Branch Manager of a Co-operative Bank is not a workman because he is responsible for the executive administration of the bank. His duties and functions are mainly managerial and whatever clerical duties he may have to perform are negligible.

In *National Engineering Industries Ltd.* v. *Shri Kishan Bhageria and others*,[2] it was held that the duties of the Internal Auditor were mainly reporting and checking up on behalf of management and the person doing such work is not a supervisor. The Auditor has no independent right or authority to take decision and his decision did not bind the company. Hence the Internal Auditor is a workman and not a supervisor.

In *Kesava Bhatt* v. *Shree Ram Ambulam Trust*,[3] the Kerala High Court held that a priest is not a workman. In its opinion a *pujari* cannot be equated with a mere wage earner and his services cannot be treated as manual or clerical etc. There was difference between a *mahant*, cook or clerk who work around the precincts of the temple or its corridor and office rooms and a priest placed in the *sanctum sanctorum* and who silently said his prayers. The deity or God he serves cannot be looked upon as a profit producing scheme and the owner of a temple cannot be equated to an industrial or commercial employer. Therefore priest is not a workman.

In *T.P. Srivastava* v. *National Tobacco Co. of India Ltd.*[4] it was held by the Supreme Court that a section salesman employed by the respondent company is not a workman because the duties of the appellant require imaginative and creative mind which could not be termed as either manual, skilled, unskilled or clerical in nature. His supervising work was only incidental.

In *Ramesh s/o Ramarao Wase* v. *The Commissioner, Revenue Division, Amravati*[5] the petitioner was a sectional engineer performing supervisory duties. He pleaded that in performance of his duties he was using technical knowledge, therefore, he was a workman. It was held that using of technical knowledge does not change the dominant nature of his supervisory duty to technical. Performing a technical job and supervisory work are two different things. In the technical work, there would hardly be any scope for judging, opinion or evaluating. Exercising control over subordinates, sanction leave or supervision over quality of work are all supervisory duties. Only because a surgeon or an engineer uses his technical knowledge in performing his job it cannot be said that they are workmen.

In *Srikant Vishnu Palwankar* v. *Presiding Officer, First Labour Court and another*,[6] the question was whether a foreman in a printing work receiving salary over Rs. 500 per month and required to assign work and supervise 6 to 8 employees, to make recommendation regarding grant of leave and make appraisal of workmen working under him, is a workman. The petitioner contended that he was mainly carrying out work of a technical nature and only incidentally he was doing some supervisory work. It was held that the petitioner is not a workman because it is difficult to understand as to how the various kinds of duties performed by the petitioner could be incidental to main work.

In *S.K. Maini* v. *M/s. Carona Sahu Co. Ltd. and others*,[7] the appellant was

1. (1988) 2 Lab LJ 49 (Kerala).
2. (1988) 1 Lab LJ 363 (SC).
3. (1990) 1 Lab LJ 192 (Ker).
4. (1992) 1 Lab LJ 86 (SC).
5. (1996) 1 Lab LJ 55 (Bom).
6. (1992) 2 Lab LJ 378 (Bom).
7. (1994) 2 LLJ 1153 (SC).

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working as shop manager and incharge of a shop of the respondent company. He was incidentally doing some clerical work also. It was held that the shop manager was not a workman. The Supreme Court observed that the question whether an employee is a workman under Section 2(s) of the Act is to be determined with reference to his principal nature of duties and functions. Designation of an employee is not of much importance but the nature of main duties performed is important and not the work incidentally done. In the present case the shop manager was only incidentally doing some clerical work. It is not necessary that he should be vested with powers to appoint or discharge employees under him. This case was followed in *C. Narayana Reddy* v. *Management of Ajantha Theatre*,[1] and *Saroj Ramesh Shah* v. *Balakrishna Pen (P) Ltd.*[2]

It was held in *Jagdish Prasad Sinha* v. *Presiding Officer, Labour Court, Lucknow and others*[3] that the Head Master of a school is not a workman. In *Indian Sulphacid Industries Limited* v. *Labour Court, Rohtak and another*,[4] a practising lawyer was engaged by the company on retainer basis to look after the interest of the company before the Labour Court. It was held that such a lawyer is not a workman.

In *Management of Puri Urban Co-op. Bank* v. *Madhusudan Sahu and another*,[5] it was held that an appraiser engaged by Bank to weigh gold ornaments and certify about the quantity, purity and value of the same for which commission was paid depending on loan amount but subject to a minimum of Rs. 2/- per appraisal is not workman because Bank has no control over the manner in which appraiser's work has to be done and Bank was also not obliged to give work to appraiser.

In *Management Sacred Heart Convent School, Panruti South Arcot* v. *State of Tamil Nadu and others*,[6] a dispute challenging termination of services of a Physical Education Teacher employed in school was raised and it was referred for adjudication to Labour Court. The school management preferred a writ against the decision of the Labour Court. It was held that Physical Education Teacher is not a workman within the meaning of the Act and reference made by Government is without jurisdiction.

Difference between workman and independent contractor.—For any person to be a workman it is necessary that he should be in the employment of the employer. Merely a contract to do some work is not enough. Unless the relationship of master and servant which is implied in the term "employed" is admitted or established, the person concerned is no workman.[7].

In *Dharangdhra Chemical Works Ltd.* v. *State of Saurashtra and others*,[8] the appellant company took from the State Government on lease certain salt work at Kudain in the State of Saurashtra. Salt was manufactured from rainwater which soaks down the surface and becomes impregnated with saline matter. The entire area was divided into small plots called "Pattas". The "Pattas" were let out to "aghiaras" at Rs. 400 a year. The point for determination was, whether these "aghiaras" were workmen or "contractor". It was proved that the "aghiaras" were free to engage extra labour at there own cost. They were paid Rs. 0-5-6 per maund for the salt produced by them. They were free to work when they liked, as no hours of work was prescribed and no muster roll was maintained. In rainy season when they were free form this work they returned to their villages and became engaged in their agricultural work. The management

1. (1995) 1 LLJ 264 (Karn).
2. (1995) 1 LLJ 176 Bom (Bom).
3. (1992) 2 Lab LJ 33 (All).
4. (1993) 1 Lab LJ 496 (P and H).
5. (1992) 2 Lab LJ 6 (SC).
6. (1992) 1 Lab LJ 745 (Mad).
7. *Dharangdhra Chemical Works Ltd.* v. *State of Saurashtra and others*, AIR 1956 SC 264.
8. AIR 1956 SC 264.

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exercised supervision and control at all stages of manufacture. The following principles were laid down by the Supreme Court :

(1) For a person to be a workman it is necessary that he should be employed in an industry and there should be relationship of employer and employee. The test to determine employer-employee relationship is the existence of the right in the master to supervise and control the work done by the servant, not only in directing what work the servant is to do, but also the manner in which he shall do this work ;

(2) As regards the fact that the "aghiaras" did piece work the Court observed that a person can be a workman even though he is paid not per day but by the job. The test is, whether the employer retained the right of controlling the work, and it makes no difference whether the man was employed on a daily wage or paid by the job.

(3) The fact that the "aghiaras" were entitled to engage other persons to do the work was not conclusive proof of the fact that they were independent contractors. The broad distinction between workman and an independent contractor lies in this that while the former agrees himself to do the work, the latter agrees to get other persons to do it. If a person agrees himself to do the work, and does the work, he is a workman, he does not cease to be a workman merely because he gets other persons to work along with him and that those persons are controlled and paid by him.

In *J.K. Cotton Spinning and Weaving Mills Co. Ltd.* v. *Labour Appellate Tribunal of India*,[1] the Mill provided to its officers under terms of the contracts the bungalows with attached gardens in the colony of the mills and some "malis" were employed by the mill to look after these gardens. The conditions of service of "malis" was determined by the mill. Their work was supervised and controlled by the mill. Payment was also made by the mill. The Supreme Court held that the "malis" must be held to be engaged in operations which are incidentally connected with the main industry carried on by the mills and are, therefore, workman within the meaning of Section 2(s).

In *Shining Tailors* v. *Industrial Tribunal, U.P.*,[2] it was held that the test to determine the relationship of employer and the workmen was the test of control and not the method of payment. Therefore, where payment was made on piece rate basis to workers of a tailoring establishment, they cannot be said to be independent contractors only on this ground.

Badli Workman.—"Badli workman" means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment but ceases to be regarded as Badli workman if he has completed one year of continuous service in the establishment.

Section 2-A. Dismissal etc., of an individual workman to be deemed to be an industrial dispute.—It is provided in Section 2-A of the Industrial Disputes Act that any dispute or difference between a workman and his employer who discharges, dismisses, retrenches or otherwise terminates the services of an individual workman shall be deemed to be an industrial dispute provided that the dispute is connected with or arose out of such discharge, dismissal, retrenchment or termination notwithstanding that other workmen or any union of workmen is a party to the dispute. Section 2-A is a valid legislation and a dispute between an individual workman and the management can be referred for adjudication to the Labour Court.[3] A dispute between a single

1. AIR 1964 SC 737.
2. (1983) 2 LLJ 413 (SC).
3. *Atlas Cycle Industries* v. *P.N. Thukra*, AIR 1971 P & H 60.

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workman and the management would also come within the natural meaning of the term industrial dispute.

Before insertion of Section 2-A a workman who was discharged, dismissed, retrenched or whose services were otherwise terminated was put to great hardship when he could not find support by a union or an appreciable number of workmen to take up his cause.[1] This section does away with the requirement of espousal of the cause of an individual workman by a union of workmen in order to convert it into an industrial dispute. In enacting Section 2-A the intention of the legislature was that an individual workman who was discharged, dismissed or retrenched or whose services were otherwise terminated should be given relief without its being necessary for the relationship between the employer and the whole body of employees being attracted to that dispute and the dispute becoming a generalised one between labour on the one hand and the employer on the other.[2] This section should be given a limited application.

Where a reference under Section 10 is made of a dispute existing under Section 2-A, the fact that the facts giving rise to the dispute arose before Section 2-A came into force would not make the reference invalid. There is no question of giving retrospective effect to Section 2-A. This is definition section and when it uses the words "where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman" it does not deal with the question as to when that was done. It refers to a situation of a state of affairs.[3] Section 2-A governs a dispute with reference to a dismissal which has been effected prior to the incorporation of this section in this Act.[4]

1. *T.V. Sunderam Iyengar and Sons Ltd.* v. *State of Madras*, AIR 1970 Mad 82.
2. *Chemicals Fibres of India* v. *D.G Bhoir*, AIR 1975 SC 1660.
3. *Ruston & Hornsby, (I) Ltd.* v. *T.B. Kadam*, AIR 1975 SC 2025.
4. *Heavy Engg. Corpn.* v. *Presiding Officer*, AIR 1978 SC 978.

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CHAPTER II
AUTHORITIES UNDER THIS ACT

The main object of the Industrial Disputes Act is investigation and settlement of industrial disputes. With that object in view various authorities have been created by the Act. The adjudication of industrial disputes has at the first instance been kept out of the jurisdiction of the Municipal Courts so that efforts may be made for settlement of such disputes through some other agencies. The Works Committee, Conciliation Officer, Board of Conciliation and Courts of Inquiry endeavour to settle the difference before it may be adjudicated upon by the Labour Court or the Industrial Tribunal. They all aim at amicable settlement of the industrial dispute. The various modes of settlement of disputes provided by the Act may broadly be classified under three heads : (1) conciliation ; (2) adjudication ; and (3) arbitration.

Those authorities that make use of conciliation as the sole method of settlement of disputes are the : (1) Works Committee, (2) Conciliation Officer, and (3) Board of Conciliation. The Labour Court, Tribunal and National Tribunal are adjudicating authorities that decide any dispute referred under the Act.

Section 10-A of the Act makes provision for voluntary reference of disputes to arbitration. Apart from the above, provision has also been made for the constitution of a Court of inquiry whose main function is to inquire into any matter appearing to be connected with or relevant to an industrial dispute.

Section 3. Works Committee.—The Works Committee is an authority under the Act. The following are the duties of the Works Committee :

(a) to promote measures for securing and preserving amity and good relations between the employers and workmen ;

(b) to achieve the above object, it is their duty to comment upon matters of common interest or concern of employers and workmen ;

(c) to endeavour to compose any material difference of opinion in respect of matters of common interest or concern between employers and workmen.

The main purpose of creating the Works Committee is to develop a sense of a partnership between the employer and his workmen. It is a body which aims to promote good-will and measures of common interest. This section is applicable only to such industrial establishment in which one hundred or more workmen are employed, or to an establishment in which a minimum of one hundred workmen have been employed on any day in the preceding twelve months. The word 'workmen' in this section is used in the same sense in which it appears in Section 2(s) of the Act. It means there must be one hundred workmen and not one hundred employees working in the establishment for many categories of employees are excluded from the definition of workmen. The Appropriate Government under Section 3(1) is authorised by general or special order, to require the employer to constitute in the prescribed manner a Works Committee. The Committee shall consist of representatives of employers and workmen engaged in the establishment. The number of representatives of workmen on the Works Committee shall not be less than the number of representatives of the employer. The representatives of workmen shall be chosen in the prescribed manner from among the workmen engaged in the establishment and in consultation with their Trade Union, if any, registered under the Indian Trade Union's Act, 1926.

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It was held in *Kemp and Co. Ltd.* v. *Their Workmen*,[1] that the institution of the Works Committee has been provided in the rules framed under the Industrial Disputes Act in order to look after the welfare and interest of the workmen. They are normally concerned with the problems arising in the day-to-day working of the concern and, function of the Works Committee is to ascertain the grievances of the employees and to arrive at some agreement when the occasion so arises. It is for that reason said that the Works Committee airs the grievances of workmen and endeavours to seek amicable settlement.

A rationalisation scheme was introduced in a Jute Company. The Tribunal has held that the workmen were entitled to wages for the period of lock-out. It was contended before the Supreme Court in *Northbrook Jute Co. Ltd.* v. *Their Workmen*,[2] that the Works Committee, which was duly constituted under the Act, had approved the scheme of rationalization after due consideration. It was further pleaded that as the representatives of workmen on the Works Committee had accepted the scheme, so the workmen should be deemed to have agreed to it. The Supreme Court observed that the representatives of workmen on the Works Committee do not represent the workmen for all purposes but only for the purpose of the functions of the Works Committee. The Works Committee was not intended to supplant or supersede the Unions for the purpose of collective bargaining ; they are not entitled to consider real or substantial changes in the conditions of service ; their task is only to smooth away frictions that might arise between the workmen and the management in day-to-day work.[3] The recommendations of the Works Committee, where the workmen are not fairly represented are of no value ; the decision of the Works Committee carries great weight but is not conclusive. The decision of Works Committee can be challenged if it is not fairly constituted or the workmen are not fairly represented on it.[4] The number of members constituting the Works Committee shall be fixed so as to afford representation to the various categories, groups and classes of workmen engaged in and to the sections, shops or department of establishment. But the total number shall not exceed twenty.[5] The representatives of the employer shall be nominated by the employer and as far as possible, shall be officials in direct touch with or associated with the working of the establishment.[6]

The workmen's representative on the Committee shall be elected in two groups, namely[7] :

(1) Those to be elected by the workmen of the establishment who are members of the registered Trade Union or Unions ; and

(2) Those to be elected by the workmen of the establishment who are not members of the registered Trade Union.

Section 4. Conciliation Officer.—The Appropriate Government may by notification in the Official Gazette, appoint conciliation officers. These officers are charged with the duty of mediating in and promoting the settlement of industrial disputes. The Appropriate Government may appoint one or more conciliation officers, as it thinks fit. A conciliation officer may be appointed for a specified area or for specified industries in a specified area, or for one or more specified industries. The appointment may be made either permanently or for a limited period. The jurisdiction, powers and other matters in respect of the conciliation officer shall be published in the

1. (1955) 1 LLJ 48.
2. AIR 1960 SC 879.
3. *Ibid.*
4. *Kemp and Co. Ltd.* v. *Their Workmen*, (1955) 1 LLJ 48.
5. The Industrial Disputes (Central) Rules, 1971, R. 39.
6. *Ibid.*, R. 40.
7. The Industrial Disputes (Central) Rules 1957, R. 42.

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Official Gazette.

Section 5. Boards of Conciliation.—The provision for appointment of Boards of Conciliation is made under the Act to bring the two parties to a dispute to sit together and thrash out their differences and to find out ways and means to settle them. Section 5 of the Act provides that the Appropriate Government may, by notification in the Official Gazette, constitute a Board of Conciliation. The object of appointing the Board is promotion of settlement of an industrial dispute. A Board shall consists of a Chairman and two or four other members, as the Appropriate Government thinks fit.

The Chairman shall be an independent person and the other members shall be persons appointed in equal numbers to represent the parties to the dispute. Any person appointed to represent a party shall be appointed on the recommendation of that party. If any party fails to make a recommendation within the prescribed time, the Appropriate Government shall appoint such persons as it thinks fit to represent that party. A Board, having the prescribed quorum may act even though the Chairman, or any of its members is absent or there is any vacancy in its number. But, if the Appropriate Government notifies the Board that the services of Chairman or of any other member have ceased to be available, the Board shall not act until a new Chairman or member, as the case may be, has been appointed.

It is to be noted that the Chairman must be an "independent person" which means a person unconnected with the industrial dispute or with the industry affected by such dispute. Of course the Appropriate Government is vested with the discretion to appoint the Board of Conciliation, whenever there is an occasion for such appointment on the arising of industrial dispute. The Board as stated above is appointed with a view to promote the settlement of industrial dispute.

The appointment of the Conciliation Board together with the names of the persons constituting the Board shall be notified in the Official Gazette. If the Central Government proposes to appoint a Board, it shall send a notice to the parties asking them to nominate within reasonable time persons to represent them on the Board.[1] The notice to the employer shall be sent to him personally or if the employer is an incorporated Company or a body Corporate, to the agent, manager, or other principal Officer of such company or body.

The notice to the workmen shall be sent :

(a) in the case of workmen who are members of a Trade Union, to the President or Secretary of the Trade Union ; and

(b) in the case of workmen who are not members of a Trade Union to any one of five representatives of the workmen who have attested the application made under Rule 3 and in this case a copy of the notice shall also be sent to the employer who shall display copies thereof on notice boards in a conspicuous manner at the main entrance to the premises of the establishment.

Section 6. Courts of Inquiry.—If any matter is referred to a Court by the Appropriate Government, it shall inquire and make a report ordinarily within a period of six months from the commencement of inquiry. Section 6(1) points out that if "occasion arises" the Appropriate Government may constitute a Court of Inquiry. The purpose of constitution of Court of Inquiry is to inquire into any matter appearing to be connected with or relevant to an industrial dispute. The constitution of the Court has to be notified in the Official Gazette. Thus it is clear that the proper occasion for appointment of a Court of Inquiry will be arising of an industrial dispute and necessary inquiry into any matter connected with or relevant to such dispute. The Court shall not

1. The Industrial Disputes (Central) Rules, 1957, R. 6.

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inquire into the industrial dispute itself.

Section 6(2) says that a Court may consist of one independent person or such number of independent persons as the Appropriate Government thinks fit. Where a Court consists of two or more members, one of them shall be appointed as a Chairman. If the Court has the prescribed quorum it may act. The fact that the Chairman or any other member is absent or the existence of any vacancy in the Court shall not debar the Court from functioning provided the quorum exists. But if the Appropriate Government notifies the Court that the services of the Chairman have ceased to be available the Court shall not act until a new Chairman has been appointed. The appointment of a Court together with the names of persons constituting it shall be notified in the Official Gazette.[1]

On a perusal of the relevant sections relating to the Court, specially Sections 22, 23 and 33 of the Act it may be seen that during the pendency of a proceeding before a Court of inquiry, the following rights remain unaffected, namely :

(i) the right of a workman to go on strike ;

(ii) the right of an employer to lock-out his business ; and

(iii) the right of employer to dismiss or otherwise to punish the workmen in certain cases under Section 33.[2]

The idea of the Court is borrowed from English Law where the report of the Courts of Inquiry is given wide publicity, and is placed before the House of Parliament, with a view to prevent and rectify any rash and precipitate action such as strike or lockout by the disputants for fear of public condemnation.[3]

Section 7. Labour Court.—The power of appointment of a Labour Court under Section 7 of the Act is vested with the Appropriate Government. The Appropriate Government may constitute one or more Labour Courts. The constitution of the Labour Court together with names of persons constituting the Labour Court should be notified in the Official Gazette. The functions of the Labour Court as provided in the Act are :

(i) adjudication of industrial disputes relating to any matter specified in the Second Schedule ;

(ii) performing of such other functions as may be assigned to them under this Act.

The following matters are specified in the Second Schedule, namely :

(i) The propriety or legality of any order passed by an employer under the Standing Orders ;

(ii) The application and interpretation of Standing Orders ;

(iii) Discharge or dismissal of workmen, including reinstatement of, or grant of, or relief to, workmen wrongfully dismissed ;

(iv) Withdrawal of any customary concession or privilege ;

(v) Illegality or otherwise of a strike or lock-out ;

(vi) All matters other than those specified in the Third Schedule.

According to Section 7(2) a Labour Court shall consist of one person only, who shall be appointed by the appropriate Government. The qualifications of a person who can be appointed as presiding officer of the Labour Court are mentioned in sub-section (3) of Section 7 as follows :

(a) he is, or has been, a judge of a High Court ; or

(b) he has, for a period of not less than three years, been a District Judge or an

1. The Industrial Disputes (Central) Rules, 1957, R. 5.
2. For details please refer to Section 33 of Ind. Disp. Act, 1947.
3. Evolution of Labour Management Relations and the Indian Law of Industrial Disputes (1953 Ed.) Sgt. Hadley, p. 99.

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Additional District Judge ; or

(c) he has held any judicial office in India for not less than seven years ; or

(d) he has been the presiding officer of a Labour Court constituted under any Provincial Act or State Act for not less than five years.

Section 7-C prescribes disqualifications of the presiding officer of a Labour Court. In *The Statesman (P.) Ltd.* v. *H.R. Deb*,[1] the question was whether a magistrate holds a judicial office. The fact that the duties of a magistrate are partly judicial and partly other do not detract from the position that while acting as a magistrate he is a judicial officer. The phrase 'holding a judicial office' postulates that there is an office and that office is primarily judicial. But where Registrar to Pensions Appeal Tribunal was appointed as presiding officer of a Labour Court it was held that the appointment was *void ab initio* because the office of the Registrar is administrative and not judicial in nature.[2] The expression "holding a judicial office" in Section 7(3)(d) signifies more than discharge of judicial functions while holding some other office.[3]

Commenting upon the jurisdiction of the Labour Court the Supreme Court in *Anand Bazar Patrika* v. *Their Employees*[4] held that :

> "If the termination of an industrial employee's services has been preceded by a proper domestic enquiry which has been held in accordance with the rules of natural justice and the conclusions reached at the said enquiry are not perverse, the tribunal is not entitled to consider the propriety or the correctness of the said conclusions. If, on the other hand, in terminating the service of the employee, the management has acted maliciously or vindictively or has been actuated by a desire to punish the employee for his trade union activities, the tribunal would be entitled to give adequate protection to the employee by ordering his reinstatement, or directing in his favour the payment of compensation, but if the enquiry has been proper and the conduct of the management in dismissing the employee is not *mala fide*, then the tribunal cannot interfere with the conclusions of the enquiry officer or with the orders passed by the management after accepting the said conclusions."

The removal from service during detention of workers solely on the basis of their detention under the Defence of India Rules without giving them an opportunity to show cause why their services should not be terminated, is improper.[5] Therefore, the workers so removed shall be entitled to back wages from the date when they offered to resume duty after their release to the date of their reinstatement.[6]

In *W.I. Match Co.* v. *Industrial Tribunal*,[7] a workman was terminated after the expiry of leave which was granted to him. A clause in the contract of employment provided that the employer could terminate employment any time in the event of the employee becoming from any cause incapacitated, by a longer period than two calendar months, from properly discharging his duties. The termination was held to be illegal. When an employee is on leave he is not called upon to discharge any duties and therefore the question of the capacity to discharge duties does not need consideration.

Section 7-A. Tribunals.—In our country the Industrial Tribunals were for the first time created by the Industrial Disputes Act, 1947. Commenting upon the status of these tribunals the Supreme Court has observed that the tribunals under the Act are

1. AIR 1968 SC 1495.
2. *Haryana Co-operative Transport Ltd.* v. *State of Punjab*, AIR 1969 Punj 66.
3. *Statesman (P.) Ltd.* v. *H.R. Deb*, AIR 1968 SC 1495.
4. AIR 1964 SC 339.
5. *Workmen, Calcutta D.L. Board* v. *Employers*, AIR 1973 SC 2251.
6. *Ibid.*
7. AIR 1978 SC 311.

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invested with many trappings of a Court but do not have the same status as Courts.[1] These Tribunals need not follow the strict technicalities of law in adjudication of industrial disputes.

The power to constitute Industrial Tribunal is conferred upon the Appropriate Government. The appointment of an Industrial Tribunal together with the names of persons constituting the Tribunal shall be notified in the Official Gazette. Further, one or more than one tribunals may in the discretion of Appropriate Government, be constituted. It is the duty of the Tribunal to adjudicate upon any industrial dispute relating to any matter, whether specified in the Second Schedule or the Third Schedule. These tribunals shall perform such other functions as may be assigned to them under this Act.

The Tribunal shall consist of one person only, who shall be appointed by the State Government. Any person having one of the following qualifications may be appointed as the presiding officer of the Industrial Tribunal, namely :

(a) if he is, or has been, a judge of a High Court ; or

(aa) if he has for a period of not less than three years, been a District Judge or an Additional District Judge.

It is provided by Section 7-A(4) that the appropriate Government, if it thinks fit, may appoint two persons as assessors to advise the Tribunal in the proceedings before it.

These Tribunals are important for many practical reasons. First, only experienced persons of high integrity can be appointed as presiding officer of the Tribunal as stated above. Secondly, almost any important matter can be submitted for adjudication to the Tribunal including questions relating to wages, bonus, provident fund, gratuity and dismissal, etc. Thirdly, the Tribunals enjoy unlimited powers so long as they act within the scope of their authority.

Powers.—The Tribunal is a judicial body[2] or at any rate a quasi-judicial body.[3] Therefore, a Tribunal must serve notice upon the parties of the reference by name and any award made without serving such notices is fundamentally wrong.[4] It could make a suitable award for bringing about harmonious relations between the employers and workmen and can direct reinstatement of a workman if it is necessary in the interest of industrial peace.[5] The Tribunal while arriving at a finding in a matter may rely on data available to it otherwise than from evidence adduced on behalf of the parties.[6]

While an application was made for quashing an award of the Industrial Tribunal, the Surpeme Court held that no writ can be issued against a Tribunal which has ceased to exist.[7] It is clear from the Act itself that Tribunals are constituted when an industrial dispute arises and normally function as long as such a dispute is not disposed of. The Tribunals can be appointed for a limited period or for deciding a specified number of disputes. When a new Tribunal is appointed it may start hearing of the case from the beginning, particularly when any prejudice is likely to be caused to any party.[8] It is open

1. *J.K. Iron and Steel Co., Kanpur* v. *Iron and Steel Mazdoor Union*, AIR 1956 SC 231.
2. In *Vishwamitra Press (Karyalaya) Kanpur* v. *Their Workmen*, AIR 1953 SC 41, it was held that Industrial Tribunal is a court within the meaning of Section 10 of U.P. General Clauses Act.
3. *Ibid.*
4. *Indian Mining Association and others* v. *Koyla Mazdoor Panchait and others*, (1952-53) 4, FJR 77 (LAT).
5. *M.K. Ranganathan and another* v. *The Madras Electric Tramways Ltd.*, (1952-53) 4 FJR 77 (Mad).
6. *Electro-mechanical Industries Ltd.* v. *Tribunal*, AIR 1950 Mad 889.
7. *Minerva Mills Ltd. Bangalore* v. *Their Workmen*, AIR 1953 SC 505.
8. *Ibid.*

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to either party to point out and convince the Tribunal that prejudice will be caused if a *de novo* trial is not held.[1]

In *Brooke Bond India* v. *Y.K. Gautam*,[2] the services of a probationer before the expiry of the probationary period were terminated without assigning any reasons, in accordance with the terms of contract. The Tribunal can in such a case go into the validity of the order of termination. The Tribunal has to see whether the action of the employer is *mala fide* or whether it amounts to victimisation of the employee or to an unfair labour practice, or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motive and is not in *bona fide* exercise of the power arising out of the contract.[3]

Where some of the employees of a company though employed outside the State of Delhi, not only received their salaries from the Delhi Office but were also controlled by the Delhi Office, the Supreme Court, upholding the decision of the Industrial Tribunal held that the Tribunal at Delhi had jurisdiction over those employees acting outside the State of Delhi.[4]

In the *Lipton Ltd. case*[5] the award of the Industrial Tribunal, Delhi, was confirmed by the Labour Appellate Tribunal. When a similar dispute between the same company and their workmen at Madras arose, the company contended that the award of Industrial Tribunal, Delhi was binding upon the workmen working at Madras also. The Madras High Court held that the Delhi award could not conclude the issue between the management and its workmen at Madras.[6] It was one of the pieces of evidence which the Tribunal at Madras was entitled to consider, but what probative value should be given to such an award was for the Tribunal to decide.

Industrial Tribunal deciding upon wage scale to the employees of an establishment would have full liberty to grant proper *ad hoc* increase of salary as part of the revision of wages.[7]

Jurisdiction.—The question whether an objection to jurisdiction of a Tribunal could be raised before the Tribunal itself or it is necessary to apply to the High Court to quash the proceedings before the Tribunal, has been considered on a number of occasion by the Courts. There can be no difficulty where the question of jurisdiction is clear from the admitted facts. The difficulty of jurisdiction actually arises where the question of jurisdiction is a mixed question of law and fact. In such cases the question should be raised before the Tribunal itself which shall determine the question after going into the facts. The proceeding before the Tribunal comes to an end if it finds that it has no jurisdiction. If in its opinion the Tribunal thinks that it has jurisdiction it may proceed on to decide the industrial dispute itself. Where a preliminary finding is given by the Tribunal or the question of jurisdiction alongwith the dispute is decided by the Tribunal, the High Court in appropriate proceedings may decide whether the Tribunal has acted with or without jurisdiction. Ordinarily the finding of fact with regard to the jurisdiction will not be interfered with by the High Court or the Supreme Court.[8] The finding of the Tribunal may be set aside by these Courts, if it is found that the Tribunal while interpreting the facts has misapplied any principle of law. Where the objection as regards the jurisdiction was not raised before the Tribunal, it cannot be, for the first

1. *Gowri Silk Mills Ltd.* v. *Their Workmen*, (1956) I LLJ 49.
2. *Brooke Bond India* v. *Y.K. Gautam*, AIR 1973 SC 2634.
3. *Brooke Bond India* v. *Y.K. Gautam*, AIR 1973 SC 2634.
4. *Lipton Ltd. and another* v. *Their Employees*, AIR 1959 SC 676.
5. *Ibid.*
6. *Workmen of M/s. Lipton Madras* v. *M/s. Lipton Ltd. Madras*, (1958) 2 LLJ 602 (Mad).
7. *Tata Consulting Engineers* v. *Workmen* (1981) 2 LLJ 147.
8. *Dharangdhra Chemical Works Ltd.* v. *State of Saurashtra*, AIR 1957 SC 264.

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time, raised before the Court unless it is a pure question of law.[1]

In *Pottery Mazdoor Panchayat* v. *The Perfect Co. Ltd. and another*,[2] the Supreme Court held that the reference being limited to the narrow question as to whether the closure was proper and justified, the tribunal by the very terms of the reference had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management. In this case two questions were referred to the Industrial Court :

1. "Whether the proposed closure by the management is proper and justified ? and
2. To what retrenchment compensation are the employees entitled if it is decided that the proposed closure is not proper and justified ?"

Appeal.—Once a question was raised, whether an appeal could be preferred from the decision of an Industrial Tribunal. The answer to this question rests on another question : whether an award of the Tribunal can be said to be "determination made by the Court or Tribunal" under Article 136 of the Constitution. Replying to this question Kania, C.J. in *Bharat Bank Ltd., Delhi* v. *Their Employees*[3] has made the following observations :

"In my opinion, the functions and duties of the Industrial Tribunal are very much like those of a body discharging judicial function, although it is not a court. The rules framed by the Tribunal require evidence to be taken and witnesses to be examined, cross-examined and re-examined. The Act constituting the Tribunal imposes penalties for incorrect statements made before the Tribunal. While the powers of the Industrial Tribunal in some respects are different from those of an ordinary Civil Court and it has jurisdiction and power to give reliefs which a Civil Court administering the law of the land (for instance, ordering the reinstatement of a workman) does not possess, in the discharge of its duties it is essentially working as a judicial body. The fact that its determination has to be followed by an order of the Government which makes the award binding, or that in cases where Government is a party the legislature is permitted to revise the decision, or that the Government is empowered to fix the period of the operation of the award do not, to my mind, alter the nature and character of the functions of the Tribunal. Having considered all the provisions of the Act it seems to me clear that the Tribunal is discharging functions very near to those of a Court, although it is not a Court in the technical sense of the word."

In view of the above observations it is clear that an appeal can be made against the decision of an industrial tribunal.

Section 7-B. National Tribunals.—(1) Unlike the other authorities under the Act the National Tribunals can only be constituted by the Central Government. The power is to be exercised by issuing of notification in the Official Gazette. The name of the person constituting the National Tribunal shall also be notified in the Official Gazette. The Central Government may constitute one or more Tribunals. National Industrial Tribunals are constituted for the adjudication of industrial dispute, which in the opinion of the Central Government (i) involves question of national importance or (ii) are of such a nature that the industrial establishments situated in more than one State are likely to be interested in or affected by such dispute. It is sole discretion of the Central Government to decide that the industrial dispute involves a question of national importance or industrial establishments situated in more than one State are interested in

1. *Kay's Construction Co. (Private) Ltd.* v. *Its Workmen*, AIR 1959 SC 38.
2. (1983) 1 LLJ 253 (SC).
3. AIR 1950 SC 188.

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or affected by the dispute.

(2) A National Tribunal shall consist of one person to be appointed by the Central Government.

(3) A person shall not be qualified for appointment as the presiding officer of National Tribunal unless he is or has been a Judge of a High Court.

(4) The Central Government may, if it thinks fit, appoint two persons as assessors to advise the National Tribunal in the proceeding before it.

Section 7-C. Disqualifications for the presiding officers of Labour Courts, Tribunals and National Tribunals.—No person shall be appointed to, or continue in the office of the presiding officer of a Labour Court, Tribunal or National Tribunal, if—

(a) he is not an independent person ; or

(b) he has attained the age of sixty-five years.

The moment any person suffers from any disqualification, he shall cease to have authority to act in the office concerned. Only those persons who do not suffer from the disqualifications stated above can be appointed to fill in any vacancy under Section 8 of the Act.

Section 8. Filling of vacancies.—If a vacancy occurs in the office of the Presiding Officer of a Labour Court, or Tribunal, or in the office of the chairman or any other member of a Board or Court the Appropriate Government shall appoint another person in accordance with the provisions of this Act to fill in the vacancy. Any vacancy in the office of Presiding Officer of a National Tribunal, shall be filled in by the Central Government in the like manner. After the vacancy is filled, the proceeding may be continued before the Labour Court, Tribunal, National Tribunal, Board or Court, as the case may be, from the stage at which the vacancy is filled. It is provided by Section 8 of the Act that only a vacancy other than a temporary absence shall be filled in accordance with the provisions of this Act. It means that the temporary absence shall not be considered a vacancy for the purpose of this section. Therefore, a vacancy shall mainly arise due to transfer, resignation or acquisition of any disqualification as provided in Section 7-C of the Act.

According to the latter part of Section 8 proceedings, after filling in the vacancy, may be started from the stage at which the vacancy is filled. But where a tribunal constituted under Section 7-A of the Act, could not dispose of some references, and a new Tribunal was constituted by the Government the proceeding must be commenced again and not started as provided for by Section 8 of the Act.[1]

Section 9. Finality of orders constituting Bords.—The main object of enacting Section 9 of the Industrial Disputes Act is to make immune, any order of the appointment made under Sections 5 to 7 of the Act, from being called in question. Therefore, no question can be raised whether an appointment was legally and properly made or not. Section 9(1) of the Act provides that no order of the Appropriate Government, or of the Central Government appointing any person as the Chairman or any other member of a Board or Court or as the Presiding Officer of a Labour Court, Tribunal or National Tribunal shall be called in question in any manner on the ground merely of the existence of any vacancy in, or defect in the constitution of such Board or Court. Section 9(2) of the Act aims to protect any settlement from being declared invalid simply on the ground that the conciliation proceeding had been continued beyond a period of fourteen days or less as fixed by the Government under Section 12(6) or that the proceedings before a Board are continued beyond a period of two months or less as fixed by the Government under Section 13(5) of the Act.

Section 9(3) of the Act provides that where the report of any settlement arrived at

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1. *Mysore Paper Mills Ltd.* v. *Their Workmen*, (1953) 2 LLJ 360 (LAT).

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in the course of conciliation proceedings before a Board is signed by the Chairman and all other members of the Board, no such settlement shall be invalid by reason only of the casual or unforeseen absence of any of the members including the Chairman of the Board during any stage of the proceedings. This sub-section applies only to conciliation proceedings before a Board of Conciliation.

The provisions of Section 9 of the Act do not in any way cure the defect of want of jurisdiction. It was held in *Jagannath Vinayak Kale* v. *M.I. Ahmedi and others*,[1] that "where the Tribunal has not been duly constituted under the Act and it was acting without jurisdiction, the defect of jurisdiction would not in any way be cured by Section 9 of the Act."

In *State of Haryana* v. *Haryana Co-op. Transport*,[2] a petition was moved to set aside the award of Labour Court on the ground that its Presiding Officer was not qualified to hold post of a Judge under Section 7(3)(d) of the Industrial Disputes Act, 1947. It was held that the words "in any manner" which occur in Section 9(1) must be given a limited meaning so as to bar the jurisdiction of Civil Courts in the ordinary exercise of their powers to entertain a challenge to appointments mentioned in the sub-section. The rights conferred by Articles 226 and 227 can be abridged only by appropriate amendment of the Constitution and their operation cannot be whittled down by a provision like the one contained in Section 9(1) of the Act. Therefore, the High Court in the exercise of its writ jurisdiction has power to consider the validity of appointment of any person as a Chairman or a member of a Board or Court or as a presiding officer of a Labour Court, Tribunal or National Tribunal.

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1. (1952) 2 LLJ 50.
2. AIR 1977 SC 237.

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CHAPTER III
NOTICE OF CHANGE

Section 9-A. Notice of Change.—Section 9-A of the Act forbids the employer to make any change in the conditions of service of any workman in respect of the matters specified in the Fourth Schedule. The conditions of service for change of which notice is to be given as enumerated in Schedule IV are :

(1) Wages, including the period and mode of payment ;

(2) Contribution paid or payable, by the employer to any provident fund, pension fund or for the benefit of the workmen under any law for the time being in force ;

(3) Compensatory and other allowances ;

(4) Hours of work and rest intervals ;

(5) Leaves with wages and holidays ;

(6) Starting, alteration or discontinuance of shift working otherwise than in accordance with Standing Orders ;

(7) Classification by grades ;

(8) Withdrawal of any customary concession or provilege or change in usage ;

(9) Introduction of new rule of discipline, or alteration of existing rules, except so far as they are provided in Standing Orders ;

(10) Rationalisation, standardisation or improvement of plant or technique which is likely to lead to retrenchment of workmen ;

(11) Any increase or the reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift, not occasioned by circumstances over which the employer has control.

However, this section provides two conditions to be fulfilled before the employer can effect any change in the conditions of service applicable to any workman. The two conditions are :

(a) The employer should give notice to the workmen likely to be affected by such change. The notice must be given in the prescribed manner and must state the changes proposed to be effected.

(b) The employer must wait, after giving such notice for twenty-one days. Any change effected before the expiry of the said period of twenty-one days shall be invalid.

In view of the proviso no notice as aforesaid need to be given in the following cases—

(a) where the change is effected in pursuance of any settlement or award.

(b) where the workmen likely to be affected by the change are persons to whom the following Rules, Regulations or Code, as the case may be, apply—

(i) Fundamental and Supplementary Rules ;

(ii) Civil Service (Classification, Control and Appeal) Rules ;

(iii) Civil Services (Temporary Service) Rules ;

(iv) Revised Leave Rules ;

(v) Civil Service Regulations ;

(vi) Civilians in Defence Service (Classification, Control and Appeal)

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Rules ;

(vii) The Indian Railway Establishment Code ; or

(viii) Any other rules or regulations that may be notified in this behalf by any Appropriate Government in the Official Gazette.

The object and purpose of Section 9-A is to afford an opportunity to the workmen to consider the effect of a proposed change and, if necessary, to present their view on the proposal. In case of a change of the date of holiday on a request by the majority of workmen even if we assume that the alteration amounts to change in the conditions of service, there is no question of contravention of Section 9-A when the majority of the workmen themselves requested the employer to make the alteration.[1]

Fixation of Sunday as weekly rest day having been founded on an usage and treated as a customary privilege, changing it to some other day of rest would fall within item 8 of the Fourth Schedule.[2] Therefore, for effecting any change in weekly rest day a notice under Section 9-A would be necessary and change without such notice would be ineffective.[3] When there is nothing to show either in the conditions of service or in the appointment letter of an employee that he would work for certain hours only, any increase in the working hours with the limits prescribed by the statute will be within the competence of the management.[4] The mere fact that the employees worked for certain hours for about six months, when the factory was in the process of being constructed, will not make it a condition for their service.[5] Whether any particular practice or allowance or concession had become a condition of service would always depend upon the facts and circumstances of each case.[6]

When a workman is retrenched it cannot be said that change in his conditions of service is effected. The conditions of service are set out in Fourth Schedule and no item in that schedule covers the case of retrenchment. Since retrenchment does not constitute change in conditions of service in respect of any item mentioned in Fourth Schedule, Section 9-A would not be attracted and no notice is necessary.[7]

Where adjudication has not previously taken place and terms and conditions of service have not been fixed by awards, the right of an employer to alter the terms and conditions of service may be exercised in accordance with the provisions of Sections 9-A and 33(1)(a). Where conditions of service are once settled by an award they cannot be altered by contract, settlement or award made in a reference under Section 10 of the Act.[8]

In *I.O. Corporation* v. *Its Workmen*,[9] the management of Assam Oil Refineries, Gauhati took a voluntary decision in September 1959 to grant to all its employees Compensatory Allowance on the basis of Central Government Circular, although the Circular was not binding on them. The allowance was not granted through any standing order or circular. In 1960 the Central Government issued another circular whereby employees in receipt of the Assam Compensatory Allowance were given an option to choose the house rent allowance or compensatory allowance. It was provided that they will not be entitled to draw both. The management thought that the circular was binding on the company also, therefore, they unilaterally, without giving any notice to the

1. *A.M. Co.* v. *Sen*, AIR 1973 SC 2155.
2. Item 8 deals with "withdrawal of customary concession or privilege or change in usage".
3. *Tata Iron and Steel Co.* v. *Workmen*, AIR 1972 SC 1917.
4. *Oil and Natural Gas Commn.* v. *Workmen*, AIR 1973 SC 168.
5. *Ibid.*
6. *Hindustan Lever Ltd.* v. *R.M. Ray*, AIR 1973 SC 1156.
7. *L. Robert D'Souza* v. *Executive Engineer, Southern Railway*, (1982) 1 LLJ 330 (SC).
8. *Haribhan Bhinde* v. *Industrial Tribunal Bombay*, AIR 1960 Bom 213.
9. AIR 1975 SC 1856.

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workers, withdrew the concession of the compensatory allowance granted in 1959 with effect from July, 1960. It was held that :

(1) the grant of the Assam Compensatory Allowance was an implied condition of service ; and

(2) by withdrawing this allowance the employer sought to effect a substantial change which adversely and materially affected the service conditions of the workmen for all times to come ; and

(3) as Section 9-A was applicable and it had not been complied with the withdrawal of the concession of compensatory allowance was illegal.

In the *Workmen of the Food Corporation of India* v. *M/s. Food Corporation of India*,[1] the corporation introduced the system of direct payment of wages in 1973 which was discontinued in February 1975 and the system of payment of wages through contractor was introduced. No notice was issued to the workers under Section 9-A of the Act. On these facts it was held that after introducing the direct payment system agreed between the parties, if the employer wanted to introduce a change in respect of any of the matters set out in 4th Schedule it was obligatory to give a notice of change. Item I in the 4th Schedule provides "wage including the period and mode of payment". By cancelling the direct payment system and introducing the contractor, both the wages and the mode of payment was altered to the disadvantage of the workmen. A notice of change was, therefore, a 'must' before introducing the change otherwise it would be an illegal change. Any such illegal change invites a penalty under Section 31(2) of the Industrial Disputes Act.

In the *Monthly Rated Workmen of Indian Hume Pipe Company Ltd.* v. *Indian Hume Pipe Company Ltd., Bombay*,[2] the respondent company has several factories through out India and a Head Office at Ballard Estate. There are daily rated workers and monthly rated staff in the factory. Slab system of dearness allowance was introduced to the workmen of the factory with effect from 1st February 1958. The daily rated workers and monthly rated clerical and subordinate staff were paid dearness allowance on different basis at different rates in the company. By a subsequent award the disparity in the dearness allowance between the monthly rated factory staff and the Head Office Staff was removed and both were given the slab system of dearness allowance. Later on notice of change was given by the Company to do away with slab system of dearness allowance which was in vogue for 18 years in respect of Head Office Staff and monthly rated factory staff. On account of a settlement the change in respect of Head Office Staff was not pressed but the company wanted to substitute the slab system by revised textile scale in case of factory staff. Thus a dispute arose between the Company and monthly rated staff of the factory. It was held that in the absence of compelling materials, a system that gives benefit to the workmen and which had worked for a long period of 18 years cannot lightly be interfered with to their detriment. The theory of ceiling over the quantum of dearness allowance cannot be accepted since under the prevailing conditions there is no control over the prices of essential commodities and as such no ceiling on quantum of dearness allowance can be imposed.

Section 9-B. Power of Government to exempt.—Section 9-B of the Act confers powers on the Appropriate Government to exempt certain class of industrial establishments or class of workmen employed in any industrial establishment from the application of the provisions of Section 9-A of the Act. What class of industrial establishments or workmen should be exempted, is the sole discretion of the Appropriate Government. The exemption may be granted if the Appropriate Government is of the

1. (1985) 2 LLJ 4 (SC).
2. (1986) 1 Lab LJ 520 (SC).

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opinion that the application of the provisions of Section 9-A to any class of industrial establishment or to any class of workmen employed in any industrial establishment—

(i) affect the employers in relation thereto so prejudicially that such application may cause serious repercussion on the industry concerned ; and

(ii) that public interest so requires.

The exemption must be notified in the Official Gazette. Further, it may be directed by the notification that the provisions of Section 9-A shall not apply or shall apply subject to such conditions, which must be specified in the notification itself. Thus the exemption granted may either be absolute or limited but in any case the limitations must be specified in the notification.

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CHAPTER IV
REFERENCE OF CERTAIN INDIVIDUAL DISPUTES TO GRIEVANCE SETTLEMENT AUTHORITIES

A new Chapter II-B has been inserted by the Industrial Disputes (Amendment) Act, 1982 whereby a new Section 9-C has been added. But this chapter has not been enforced till now.

Section 9-C. Setting up of Grievance Settlement Authorities and reference of certain individual disputes to such authorities.—(1) The employer in relation to every industrial establishment in which fifty or more workmen are employed or have been employed on any day in the preceding twelve months, shall provide for, in accordance with the rules made in that behalf under this Act, a Grievance Settlement Authority for the settlement of industrial disputes connected with an individual workman employed in the establishment.

(2) Where an industrial dispute connected with an individual workman arises in an establishment referred to in sub-section (1), a workman or any trade union of workmen of which such workman is a member, may refer, in such manner as may be prescribed, such dispute to the Grievance Settlement Authority provided for by the employer under that sub-section for settlement.

(3) The Grievance Settlement Authority referred to in sub-section (1) shall follow such procedure and complete its proceedings within such period as may be prescribed.

(4) No reference shall be made under Chapter III with respect to any dispute referred to in this section unless such dispute has been referred to the Grievance Settlement Authority concerned and the decision of the Grievance Settlement Authority is not acceptable to any of the parties to the dispute.

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CHAPTER V
REFERENCE OF DISPUTES TO BOARDS, COURTS OR TRIBUNALS

Section 10. Reference of Disputes to Boards, Courts or Tribunals.—Section 10(1) of the Act is in the nature of operative provision providing for reference of any matter relating to an industrial dispute or the dispute itself to various authorities created by the Act. A precondition for making any reference by the Appropriate Government under this section is in existence or apprehension of an industrial dispute. The reference should be by an order in writing. This sub-section provides that where the Appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time :

(a) refer the dispute to a Board for promoting a settlement thereof ; or

(b) refer any matter appearing to be connected with or relevant to, the dispute to a court for inquiry ; or

(c) refer the dispute or any matter appearing to be connected with, or relevant to the dispute, to a Labour Court for adjudication provided the dispute relates to any matter specified in the second schedule ; or

(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute (where it relates to any matter specified in the Second Schedule or Third Schedule), to a tribunal for adjudication :

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen the Appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c) above :

Provided further that where the dispute relates to a public utility service and a notice of strike or lock-out under Section 22 has been given, the Appropriate Government shall make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced. No such reference shall be made if the notice has been frivolously or vexatiously given or that it would be inexpedient to make the reference :

Provided also that where the dispute in relation to which the Central Government is the Appropriate Government, it shall be competent for that Government to refer the dispute to a Labour Court or an Industrial Tribunal, as the case may be, constituted by the State Government.

Under Section 10 (1-A) the Central Government may refer a dispute to a National Tribunal for adjudication if it is of the opinion that—

(i) any dispute exists or is apprehended ; and

(ii) the dispute involves any question of national importance ; or

(iii) the dispute is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by such dispute ; and

(iv) the dispute should be adjudicated by a National Tribunal.

It is further provided that the reference to National Tribunal shall be made by the Central Government only whether it is the Appropriate Government in relation to that

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dispute or not. The reference must be by an order in writing. The Central Government may refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the second schedule or the third schedule.

Section 10(2) of the Act provides for compulsory reference of an industrial dispute by the Appropriate Government. The two conditions that make it obligatory for the Appropriate Government to make a reference are :

(i) An application in the prescribed manner made by the parties to an industrial dispute, whether made jointly or separately ;

(ii) Satisfaction of the Appropriate Government as to the fact that the persons applying represent the majority of each party.

If these two conditions are fulfilled then the industrial dispute may be referred to Board, Court, Labour Court, Tribunal or National Tribunal.

(2-A) An order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section shall specify the period within which such Labour Court, Tribunal or National Tribunal shall submit its award on such dispute to the Appropriate Government :

Provided that where such industrial dispute is connected with an individual workman, no such period shall exceed three months :

Provided further that where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, to the Labour Court, Tribunal or National Tribunal for extension of such period or for any other reason, and the presiding officer of such Labour Court, Tribunal or National Tribunal considers it necessary or expedient to extend such period, he may for reasons to be recorded, in writing, extend such period by such further period as he may think fit :

Provided also that in computing any period specified in this sub-section, the period, if any for which the proceedings before the Labour Court, Tribunal or National Tribunal had been stayed by any injunction or order of a Civil Court shall be excluded :

Provided also that no proceedings before a Labour Court, Tribunal or National Tribunal shall lapse merely on the ground that any period specified under this sub-section had expired without such proceedings being completed.

Section 10(3) of the Act provides that where an industrial dispute has been referred to Board, Labour Court, Tribunal or National Tribunal under Section 10 of the Act, the Appropriate Government may issue an order prohibiting the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of reference.

The scope of an adjudication proceeding is laid down in Section 10(4) of the Act. Where an order making the reference of any industrial dispute to any authorities as mentioned in this section had been made and wherein the points of dispute for adjudication are specified the adjudication shall be confined only to those points and the matters incidental thereto.

Sub-section 5 of Section 10 empowers the Appropriate Government to include at the time of making the reference or at any time before the submission of the award, any other establishment, group or class of establishments of a similar nature, which is or is likely to be interested in or affected by the dispute. Such inclusion is permissible whether at the time of inclusion any dispute exists or is apprehended in that establishment, group or class of establishments. Whether the dispute is of such a nature that any other establishment, group or class of establishments of a similar nature is likely to be interested in or affected by such dispute or not is the absolute discretion of the Appropriate Government. The Appropriate Government may arrive at such a

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conclusion either on an application being made to it or otherwise.

Section 10(6) of the Act provides that where any reference has been made under sub-section (1-A) to a National Tribunal, then notwithstanding anything contained in this Act, no Labour Court or Tribunal shall have jurisdiction to adjudicate upon any matter which is under adjudication before the National Tribunal and accordingly—

(a) if the matter under adjudication before the National Tribunal is pending in a proceeding before a Labour Court or Tribunal, the proceeding before the Labour Court or the Tribunal, as the case may be, in so far as it relates to such matter, shall be deemed to have been quashed on such reference to the National Tribunal ; and

(b) it shall not be lawful for the Appropriate Government to refer the matter under adjudication before the National Tribunal to any Labour Court or Tribunal for adjudication during the pendency of the proceeding in relation to such matters bfore the National Tribunal.

Explanation.—In this sub-section, 'Labour Court' or 'Tribunal' includes any Court or Tribunal or other authority constituted under any law relating to investigation and settlement of industrial disputes in force in any State.

Section 10(7) of the Act provides that where a reference of a dispute in relation to which the Central Government is not the Appropriate Government, is made to a National Tribunal, then notwithstanding anything contained in Sections 15, 17, 19, 33-A, 33-B and 36-A the Appropriate Government in relation to such dispute shall be the Central Government. But save as aforesaid and otherwise expressly provided in this Act, any reference in any other provisions of this Act to the State Government in relation to that dispute shall mean a reference to the State Government.

(8) No proceedings pending before a Labour Court, Tribunal or National Tribunal in relation to an industrial dispute shall lapse merely by reason of the death of any of the parties of the dispute being a workman, and such Labour Court, Tribunal or National Tribunal shall complete such proceedings and submit its award to the Appropriate Government.

Section 10(1) confers a discretionary power on the Government and this discretionary power can be exercised on being satisfied that an industrial dispute exists or is apprehended. There must be some material before the Government on the basis of which it forms an opinion that an industrial dispute exists or is apprehended. The power conferred on the Appropriate Government is an administrative power and the action of the Government in making the reference is an administrative act. The adequacy or sufficiency of the material on which the opinion was formed is beyond the pale of judicial scrutiny. If the action of the Government in making the reference is impugned by a party it would be open to such a party to show that what was referred was not an industrial dispute and that the tribunal had no jurisdiction to make the award but if the dispute was an industrial dispute, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before Government on which it would have come to an affirmative conclusion on those matters.[1]

Ordinarily and generally in a large number of cases, a reference is made when the government finds that an industrial dispute exists. There are cases where dispute is only apprehended or even there may be where some dispute exists and some are

1. *A.S. Production Agencies v. Ind. Tribunal, Haryana*, AIR 1979 SC 170 ; *State of Madras v. C.P. Sarathy*, AIR 1953 SC 53.

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apprehended. To keep an order of reference free from pale of attack on such a ground, the Government will be well advised to specify one or the other in their order of reference. The Government should clarify the position and remove the ambiguity by filing a counter when the reference order is challenged on this ground.[1]

In *Sadhu Ram* v. *Delhi Transport Corpn.*,[2] the Conciliation Officer had reported to the government the fact of failure of conciliation proceeding. On this report the government referred the dispute to the Labour Court. The Supreme Court held that the Government was justified in thinking that there was an industrial dispute and, therefore, the reference to the Labour Court was within its powers.

Section 10(1) of the Act confers discretion on the Government to refer a dispute or not. But when conciliation proceedings have failed, the reasons for refusing to refer the dispute for adjudication must be recorded by the Government. In *Bombay Union of Journalists* v. *State of Bombay*,[3] the Supreme Court refused to accept that the Appropriate Government is precluded from considering even *prima facie* the merits of the disputes when it decides the question as to whether its power to make a reference should be exercised under Section 10(1) read with Section 12(5) or not. If the claim made is patently frivolous or clearly belated, the Appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the Appropriate Government may take that into account in deciding whether reference should be made or not. Therefore, a *prima facie* examination of the merits cannot be said to be foreign to the inquiry which the Appropriate Government is entitled to make dealing with a dispute under Section 10(1) and so the argument that the Appropriate Government exceeded its jurisdiction in expressing its *prima facie* view on the nature of the termination of service cannot be accepted.

In *Workmen* v. *I.I.T.I. Cycles of India Ltd., and others*,[4] the State Government refused to make a reference of an industrial dispute for adjudication on the ground that there was a settlement between the management and the recognised union under Section 18(1) of the Industrial Disputes Act, 1947 and the Industrial Tribunal accepted the terms of the settlement as fair and just when the validity of the settlement was questioned by two other minority unions. It was held by the Supreme Court that it was not obligatory on the part of the State Government to make a reference of dispute in each and every case. In this case the order of the Government refusing to make a reference does not call for interference because there was a settlement having the support of the majority of workers and the settlement was found fair and just by the Industrial Tribunal. The Government can decline reference in the interest of industrial peace, The Government has not declined on the ground that the dispute was raised by a minority union. Even a minority union can raise a dispute. The Government itself has not adjudicated the dispute, it has only referred in its order to findings of the Tribunal which has adjudicated the merits of the case.

In *United India Insurance Co. Ltd.* v. *Paramjit Singh and another*,[5] a civil suit seeking injunction restraining the management from terminating services of workman was instituted but the services were terminated prior to passing of order of injunction. Therefore the suit was dismissed as it has become infructuous. The workman raised an industrial dispute relating to his termination which was referred to the Industrial Tribunal. It was held that the dismissal of suit for injunction on the ground that it

1. *I.T.C. Factory Monghyr* v. *Labour Court*, AIR 1978 SC 1428.
2. (1983) 2 LLJ 383 (SC).
3. *Bombay Union of Journalists* v. *State of Bombay*, AIR 1964 SC 1617.
4. (1995) 2 LLJ 688 (SC).
5. (1995) 1 LLJ 640 (P & H).

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became infructuous would not be a bar to the workman from raising an industrial dispute challenging his dismissal.

In *Ved Prakash Gupta* v. *Messrs Delton Cable India (P) Ltd.*[1] the charge of using of abusive language by the employee to the employer was held not to be so serious as to justify the dismissal of the employee on the ground that it lead to loss of confidence in employee. The punishment was shockingly disproportionate.

Reference of industrial dispute.—The act of making a reference of any dispute under sub-section (1) is an administrative act and neither judicial nor quasi-judicial. If the Appropriate Government decides that no reference is necessary, the Government cannot be compelled by issuing a writ to make a reference. The use of the word 'may' shows that the power is discretionary and not mandatory. If in any particular case, the Government acts arbitrarily or contrary to law in refusing to refer a dispute to the Tribunal or Labour Court, then such a refusal may be a right ground for petition under Article 226 of the Constitution.[2]

It was held in *Sultan Singh* v. *State of Haryana & another*,[3] that a conjoint reading of Section 10(1) and Section 12(5) of the Industrial Disputes Act, 1947 makes it clear that it would be open to the State Government to form an opinion whether a dispute exists or is apprehended and thereafter it may either make a reference or refuse. The decision is based on subjective satisfaction of the Government. Only the order of refusal to make a reference needs to be communicated and the order must record the reasons for refusing to make a reference. It is only an administrative order and not a quasi judicial order. There is no need to issue any notice to the employer nor to hear the employer before making a reference or refusing to make a reference.

In *Sukhwinder Kaur and others* v. *Punjab Roadways and another*,[4] the services of a workman was terminated. He served a demand notice. The Government took seven long years to refer the matter for adjudication. The workman died after passing of the award. It was held that the workman is not responsible for this delay and hence he cannot be denied back wages as there was no delay on his part.

In *A.S. Production Agencies* v. *Ind. Tribunal Haryana*[5] the Union complained about illegal termination of service of two workmen and demanded their reinstatement with full back wages and continuity of service. The Government referred the question as to whether the retrenchment of the two workmen was justified and if not, to what relief they were entitled to. It was held that the reference was valid because the question of retrenchment was not an entirely different dispute. Retrenchment comprehends termination of service. Termination of service may be brought by dismissal, discharge, removal from service or even retrenchment apart from resignation or voluntary retirement.

In *Hotel Imperial, New Delhi* v. *Chief Commr., Delhi*,[6] a dispute between the Imperial Hotel, New Delhi and its workmen as represented by the Hotel Workers Union, was referred to adjudication under Section 10 of the Act. The employer contended that reference was bad on the grounds : first, the Union could not be a party to the reference and secondly, the reference was vague as it did not exactly indicate the number of workmen involved. The Supreme Court rejected both the arguments and held that Section 36 permits workmen to be represented by their Trade Union and further that it was not necessary to mention who were the workmen involved in the dispute.

1. (1984) 1 LLJ 546 (SC).
2. *Govt. of India* v. *National Tabacco Co.* AIR 1977 AP 250.
3. (1996) 1 LLJ. 879 (SC).
4. (1995) 1 LLJ 958 (P & H).
5. AIR 1979 SC 170.
6. AIR 1959 SC 1214.

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In *State of Maharashtra* v. *K.E. Union*,[1] certain disputes concerning production bonus scheme between Kamani Employees' Union and their company was referred by the State Government to the Industrial Tribunal. During the pendency of the adjudication, the State Government made another reference to the same Tribunal on the question whether the existing scheme of production should be replaced by the new Incentive Scheme. It was held that the question covered by the second reference was a matter "connected with or relevant to" the dispute of the first reference and hence the Government was within the jurisdiction in making a reference under Section 10(1)(d) of the Act. Second reference neither amounted to withdrawal nor supersession of previous reference. There will be withdrawal of a reference, when the dispute referred is taken out of the purview of the Tribunal. There will be supersession of a previous reference when the second reference comprises matters or disputes totally unconnected with or different from the disputes originally referred.

The Appropriate Government while making a reference of a dispute under this section should not refuse to consider relevant matter, nor should they take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. The Courts have power to see that the Executive acts lawfully.[2] A decision of the Government issuing the order of reference can be challenged on the ground of *mala fides*. If a party to an industrial dispute proves that the Government was actuated by *mala fides* in making a reference it is liable to be quashed on that ground.[3] The tribunal cannot go beyond the terms of reference. Decision of the Tribunal on any point not referred to it would be invalid being beyond its jurisdiction.[4]

In *Swadeshi Cotton Mills* v. *Labour Court I, Kanpur and others*[5] the Labour Court recorded a finding that although the workman was engaged as a sprayman, he was actually doing the work of duplicating the designs and also a tracer in addition to his work as sprayman. On the basis of this finding the Labour Court fixed the basic wages of the workman at Rs. 500 per month. The award was challenged on the ground that the terms of reference to the Labour Court did not give it jurisdiction to create the post of Sprayman-Designer. It merely called upon the Court to fix the salary of Sprayman-Designer. The Supreme Court found that the claim of the workman for the basic wage of Rs. 500 was made on the basis of basic wage of the tracer and designer. The workman was not doing the work of designer but he was only duplicating the designs. Hence, it was held that the reduction of the basic wage by the High Court from Rs. 500 to Rs. 300 per month cannot be said to be unjustified. It was also held that the Labour Court cannot exceed its jurisdiction which was limited by the terms of reference.

In *V. Veeraranjan and others* v. *The Government of Tamil Nadu and others*[6] action was initiated by the management against 154 workmen for wilful disobedience of lawful orders of superiors, acts subversive of good and proper behaviour within the establishment after authorised hours of work without permission and shouting of slogans within the establishment amounting to misconduct under Standing Orders. Later 134 of the workmen were taken back into employment. In regard to 7 of the dismissed workmen conciliation was undertaken and upon its failure disputes were raised under Section 11-A and were asked to be referred to the Labour Court for adjudication. But the Government declined to make a reference. All the workmen who were proceeded against had accepted the guilt. It was held that the industrial unrest etc. are not germane

1. AIR 1955 SC 635.
2. *Hochtief Gammon* v. *State of Orissa*, AIR 1957 SC 2226.
3. *British India Corporation Ltd.* v. *The Industrial Tribunal Punjab*, AIR 1957 SC 354.
4. *U.P. Electric Supply Co. Ltd.* v. *Workers of Messers S.M. Chaudhary*, AIR 1960 SC 818.
5. (1995) II LLJ 637 (SC).
6. (1987) I Lab LJ 209 (SC).

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and relevant for the purpose of declining to refer the dispute for adjudication. If the dispute raised involves disputed question of law and fact, the Appropriate Government cannot reach final conclusion. When all the workmen had accepted their guilt, there was no justification for the employer to discriminate between 134 workmen who were restored to service and the remaining 20 including those to whom re-employment was not given. The Government can not refuse reference on the ground that they had considered the quantum of punishment and the nature of charges framed. Therefore, the Government was directed to refer the dispute for adjdudication by the Labour Court.

If the Government rejects a request for a reference or declines to make a reference, it cannot be said that the industrial dispute has ceased to exist. In such a situation the Government can subsequently make a reference when the material and relevant consideration for exercise of power are available.[1] Where a Government once decides not to make a reference of any dispute, it can still later on change its mind and make a reference[2] because an order of the Government under Section 10(1) of the Act is an administrative act[3] and not judicial or quasi-judicial order.[4] Such an order shall be valid whether there is some change in the circumstances warranting such a reference or not. An objection at appellate stage that an order of reference is invalid is not maintainable when Government is not party to the proceeding and when material relating to the dispute is not available.[5]

In *Bharat Coaking Coal Ltd.* v. *Presiding Officer and another*,[6] a pump operator in the service of Bharat Coaking Coal Ltd. was medically examined by the Medical Board constituted by the Management and was certified to be of 58 years of age. He was continued in service for two more years on that basis and retired on attaining the age of 60 years. After retirement the workman raised a dispute which was refered to the Industrial Tribunal. The tribunal found that the age of the workman was not correctly determined by the Medical Board and therefore, it directed the workman to be medically examined by Civil Surgeon. The writ petition by the management before the High Court failed and hence a civil appeal by special leave to Supreme Court was preferred. It was held that the Industrial Tribunal was not justified in setting aside the medical opinion regarding the age of the workman determined by the Medical Board. No objection was raised before the tribunal regarding the competency of the doctors constituting the Medical Board. In fact the workman did not challenge the opinion of the Medical Board, instead continued in service after 58 years on that basis. It was held that the dispute raised by the workman after retirement is unjustified.

In *Management of Nathu Spinning Mills* v. *Government of Andhra Pradesh*,[7] the Andhra Pradesh High Court held that where the State Government has once refused to refer a dispute on the ground that a binding settlement was in operation on the subject matter of the dispute in consequence of an agreement reached between the management and the majority union under Section 12(3) read with Section 18(3), a reference can only be made if it is necessitated by changed circumstances. This decision is in confirmity with the principles enunciated by the Supreme Court in *Western India Match Co. Ltd.* v. *Western India Match Co. Workers Union*[8] wherein it was held that although refusal to make reference is no bar to make reference at a later date but the same must

1. *A.S. Production Agencies* v. *Industrial Tribunal Haryana*, AIR 1979 SC 170.
2. *Binny Limited* v. *Their Workmen*, AIR 1972 SC 1975.
3. *Western India Watch Company Ltd.* v. *Western India Watch Co. Worker's Union*, AIR 1972 SC 1205.
4. *Shri Ram Vilas Services Ltd.* v. *State of Madras*, AIR 1958 Mad 115.
5. *Binny Limited* v. *Their Workmen*, AIR 1972 SC 1975.
6. (1996) 1 LLJ 453 (SC).
7. (1990) Lab IC 451 (AP).
8. (1970) 2 Lab LJ 256 (SC).

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be necessitated by change of circumstances.

It has been held by the Madras High Court in *State of Madras* v. *K.N. Padmanabhan Iyar*[1] that the power of the State to make a reference must be determined with reference not to the date on which it is made but the date on which the right which is the subject-matter of the dispute arises, and machinery provided under the Act will be available for working out the rights which had accrued prior to the closing of the business.

Only those disputes which are actually covered by the definition of "industrial dispute" as given in Section 2(k), can be referred by the Government to the Tribunal under Section 10.[2] There is no bar to the State Government referring disputes piecemeal having regard to the exigencies of the situation.[3]

Further Section 10(1) of the Act requires that the order must be in writing. Rule 3 prescribes the particular form of application to be made by parties to the dispute. But nowhere there is any mention of a particular form of the order of reference or its contents. It was held in *Indian Paper Pulp Co. Ltd.* v. *Indian Paper Pulp Workers Union*[4] that it would be sufficient if the existence of a dispute and the fact that the dispute is referred to a Tribunal are clear from the order making reference....merely defect in drafting will not invalidate the reference. But the order must be self-contained and must be construed objectively with reference to the language used in the order itself.[5]

In *P.K. Singh* v. *The Presiding Officer*[6] 'C' Grade Fitters of Arms Factory claimed wages and allowances on par with 'B' Grade Fitters on the ground that they were doing the same duties as 'B' Grade Fitters. It was held that a 'C' Grade Fitter cannot claim the wages of a 'B' Grade Fitter unless he is duly promoted after getting through the prescribed trade test. He has no existing right to claim it. Such right is to be decided on a reference made under Section 10(1) of the Act.

In *Mahesh Transport Co.* v. *T. & D. Workers Union*,[7] some workers were employed by the two firms Mahesh Transport Company and M/s. Krishna Commercial Company, Bombay. A common employee of the firm used to make the payment to the workers on behalf of both the firms. The workers at the time the dispute was raised, had no idea as to how the two employer firms were inter-related and adjusting the payment of liability between themselves. The two employer firms did not implement the Wages Board recommendations, therefore, the Central Government made a reference describing both the firms as employers. The two firms contended that the workers were employees of a labour contractor with whom they had their contract. It was held that the reference was valid because even if what two firms had done created a situation of common employment that was not of the seeking of the workers. The doctrine of common employment may apply where the workers contract separately to serve the two employers, without the latter's mutual agreement.

In *Shiv Dayal* v. *State of Haryana and another*,[8] the petitioner was in service of respondent No. 2 and his service was terminated for misconduct after holding a domestic inquiry. The petitioner submitted a notice of demand and the Conciliation Officer submitted his report under Section 12(4) regarding failure to reach a

1. AIR 1958 Mad 578.
2. *Modern Textile Mills (Private) Ltd.* v. *State of Punjab*, AIR 1958 Punj 4.
3. *N.M. Chakravarty* v. *State of Assam*, AIR 1960 Assam 11.
4. AIR 1949 FC 148.
5. *Commissioner of Police, Bombay* v. *Goverdhandas Bhanali*, AIR 1952 SC 16.
6. (1988) 2 Lab LJ 363 (SC).
7. AIR 1974 SC 868.
8. (1996) 1 LLJ 547 (P & H).

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compromise. The Government of Haryana refused to make a reference of dispute on the ground that the workman had settled the account with the management by accepting a cheque sent by them. It was held that the refusal of Government to make a reference was made on wholly irrelevant consideration as mere accepting of cheque by the workman cannot be equated with a case where the parties negotiate some matter and then enter into some compromise. There is no material on record to show that after termination of their services as a measure of punishment the employer had called upon the employees to negotiate the matter and, therefore, the workmen had accepted the amount sent by the employer. Therefore refusal to make a reference is not proper and just.

Where the dispute regarding workmen of one factory of company represented by their union and the company was referred to the Tribunal under Section 10(2) of Act, it was held that the effect of award does not extend to workmen of other factories.[1] There is no prescribed limitation for reference of disputes, but they should be referred as soon as possible after they have arisen and after conciliation proceedings have failed.[2]

In *Shankar Chakravarti* v. *Britannia Biscuit Co.*,[3] the question was whether in the absence of any request by the employer, it is the duty of the Labour Court or Tribunal to call *suo motu* the employer to adduce additional evidence to justify the penal termination of service of a workman. It was held that such a right must be availed by the employer by making a proper request at the time it makes an application seeking approval of its action. If such a request is made before the proceeding is over the Labour Court should ordinarily grant this opportunity to adduce evidence. But if no such rueqest is made at any stage of the proceedings there is no duty in law on the Labour Court to give such an opportunity and, therefore, failure to give any such opportunity will not vitiate the proceedings.

It is well settled fact that while exercising power of making a reference under this section the Appropriate Government performs an administrative function and not a judicial or quasi-judicial act. It being an administrative function the Appropriate Government cannot delve into the merits of the dispute and determine the *lis*. The Appropriate Government is to be satisfied that an industrial dispute exists or is apprehended and this may permit the Government to determine *prima facie* whether an industrial dispute exists or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons and not for industrial peace and harmony. If the determination of the Appropriate Government is based on irrelevant considerations not germane to the exercise of power, it is liable to be questioned in exercise of the power of judicial review. If the grounds on which or the reason for which the Government declined to make the reference under Section 10(1) are irrelevant, extraneous or not germane, to the determination, the aggrieved party would be entitled to move the court for writ of *mandamus*.[4]

In *Telco Convoy Drivers Mazdoor Sangh* v. *State of Bihar*,[5] the Sangh demanded permanent status and other benefits to all convoy drivers just like other permanent employees. The Deputy Commissioner of Labour refused to make a reference on the ground that convoy drivers were not workmen and there was no relationship of master and servant between Telco and drivers. It was held that question whether convoy drivers are workmen or not is an issue to be referred for adjudication. This question cannot be decided by the Government. Of course the Government is entitled to form an opinion

1. *Indian Oxygen Ltd.* v. *Their Workmen*, AIR 1969 SC 306.
2. *Shalimar Works Ltd.* v. *Their Workmen*, AIR 1950 SC 1217.
3. (1980) 2 LLJ 78(SC).
4. *Ram Avtar Sharma and another* v. *State of Haryana and another*, (1985) 2 LLJ 187 (SC).
5. (1989) 2 Lab LJ 558 (SC).

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as to whether an 'industrial dispute' exists or not but it is not justified in deciding the dispute on merits. The question, whether the persons raising the dispute are workmen or not, cannot be decided by the Appropriate Government in exercise of its administrative function under Section 10(1).

In *Raj Kumari and another* v. *State of Himachal Pradesh*,[1] the first petitioner was employed as Clerk-cum-Typist in the Divisional Forest Office. The employment of petitioners was discontinued after a few years and the Union raised a dispute. The Government refused to refer the dispute for adjudication on the ground that the said Department was not industry. It was held that if there is a dispute as to whether a particular activity amounts to an 'industry' or not, it is not for the State Government to decide, while exercising powers under Section 10(1) read with Section 12(5). These matters fall within the jurisdiction of the Tribunal and so the State Government has to make a reference.

In *M.P. Irrigation Karmchari Sangh* v. *The State of M.P. and another*,[2] the Supreme Court had the opportunity to examine the relative position of the province of the Government and the tribunal regarding reference. In this case the Trade Union of workmen employed in Chambal Hydel Irrigation Scheme raised three demands for grant of Chambal allowance, dearness allowance on par with Central Government employees and wages for the period of strike. The M.P. Government referred the dispute regarding wages for the strike period but declined to refer two other questions on the ground that the Government (i) is not in a position to bear the additional burden ; and (ii) the grant of dearness allowance would invite similar demands by other employees affecting the entire administration. The order of the State Government declining to make reference was challenged by the employees. The Supreme Court held that it is the province of the Industrial Tribunal to decide the disputed questions, while the State has very limited jurisdiction to examine patent frivolousness of the demand. The demarcation functions are : (a) reference ; (b) adjudication. When a reference is rejected on the ground that the Government cannot bear additional burden, it constitutes adjudication and thereby usurpation of the powers of a quasi-judicial tribunal by an administrative authority. What exactly are the conditions of service of the employees and in what manner their conditions of service could be improved are matters which are the special powers of the appropriate tribunals to be decided in adjudicatory processes and are not ones to be decided in *prima facie* examination of the demand. There may, however, be exceptional cases in which the State Government may on proper examination of the demand come to a conclusion that the demands are either perverse or frivolous and do not merit a reference and courts will always be vigilant whenever the Government attempts to usurp the powers of Tribunal. To allow the Government to do so would be to render Section 10 and Section 12(5) of the Industrial Disputes Act nugatory.

In *Jitendra Nath Biswas* v. *M/s. E.I. & Ceylone Tea Co.*,[3] the appellant a dismissed employee of the respondent company filed a suit in the Civil Court challenging his dismissal in pursuance to domestic inquiry and claiming back wages. It was held that Section 10 read with Section 12(5) of the Industrial Disputes Act confers the right on a worker for reinstatement and back wages if the order of termination or dismissal is not in accordance with the Standing Orders. It also provides a detailed procedure and machinery for getting this relief. The Scheme of the Industrial Disputes Act clearly excludes the jurisdiction of the Civil Court by implication in respect of remedies which are available under the Act and for which a complete procedure and machinery has been provided in this Act.

1. (1989) 2 Lab LJ 421 (HP).
2. (1985) 1 LLJ 419 (SC).
3. (1989) 2 Lab LJ 572 (SC).

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In *Rajasthan State Road Transport Corporation and Another* v. *Shri Krishnakant and others*,[1] the employees of the corporation filed civil suits for declaration that termination of their services was null and void as it was passed in contravention of the standing orders. The suits were decreed and hence a civil appeal was filed in the High Court. It was held that the termination is challenged by the employees not on the ground that the termination is in violation of statutory regulations framed under the Road Transport Corporation Act but on the ground that the action was in contravention of standing orders. Hence the cases are governed by the decision in *Jitendra Nath Biswas* v. *Empire of India and Ceylon Tea Co. and another*,[2] and in accordance with the said decision the jurisdiction of the civil court is excluded. It was further said that from the point of view of workmen, the remedy of adjudication under Industrial Disputes Act would be more beneficial than that of a civil court in as much as civil court cannot grant reinstatement which relief can be granted by the Labour Court or Industrial Tribunal.

Scope of reference under Section 10.—Sections 10(1) and 10(4) of the Act lay down the scope of reference. Under the former clause matters appearing to be connected with or relevant to the dispute may be referred and under the latter clause the scope of reference shall be confined to specified points of dispute and matters incidental thereto. Unless a dispute was raised by the workmen with their employer it could not become an industrial dispute.[3] The scope of reference under Section 10 has to be gathered from the circumstances preceding the Government order.[4]

Sections 10 and 10-A are the alternative remedies to settle an industrial dispute. Once the parties have chosen the remedy under Section 10-A, the Government cannot refer the same dispute for adjudication under Section 10. If any such reference is made, it is invalid.[5]

Where a reference was made under Section 10 of the Tribunal regarding the question of abolition of contract labour it was pointed out that the Appropriate Government has power under Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 to prohibit employment of contract labour. If the work for which contract labour is employed is incidental to and closely connected with the main activity of the industry and is of a perennial and permanent nature, the abolition of contract labour could be justified.[6] In such a case it would also be open to the Industrial Tribunal to have regard to the practice obtaining in their industries in or about the area.[7]

In *Tamil Nadu Joint Action Council and Textile Trade Union* v. *Government of Tamil Nadu and others*,[8] there was dispute between Textile Mills in Tamil Nadu and their workmen. The Government of Tamil Nadu referred the dispute leaving out ten Mills on the ground that there was settlement in force between such Mills and its workmen. The Joint Action Council challenged the order leaving out ten Mills from the reference. It was held that since the dispute was industry-wise and not establishment-wise dispute, the ten Mills should have been included in the reference and it should have been left to the Management of the Mills to object to the reference before the Tribunal.

In *Hotel Imperial, New Delhi* v. *Hotel Workers Union*[9] some workmen working in a Hotel in New Delhi were suspended pending disposal of applications under Section

1. (1994) 1 LLJ 136 (SC).
2. (1989) 2 LLJ 572 (SC).
3. *Sindhu Resettlement Corporation Ltd.* v. *Industrial Tribunal of Gujarat*, AIR 1968 SC 529.
4. *Jaipur Udyog Ltd.* v. *C.W.K. Sangh*, AIR 1972 SC 1352.
5. *Karnal L.K. Sanghatan* v. *Liberty Footwear Company*, (1989) 2 Lab LJ 550 (SC).
6. *Vegoils (P) Ltd.* v. *The Workmen*, AIR 1972 SC 1942.
7. *Ibid.*
8. (1987) 1 Lab LJ 105 (SC).
9. AIR 1969 SC 1334.

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33 of the Act. The Industrial Tribunal directed that usual wages and an additional sum of Rs. 25 per month in lieu of food should be paid to the workmen as interim relief. It was contended that the direction of the Tribunal, granting interim relief being not a point of reference, was beyond the scope of reference, hence bad. The Supreme Court observed that interim relief can be granted as a matter incidental to the main question, without being itself referred in express terms but the interim relief should not be the whole relief that the workmen would get if they succeeded finally. Where a settlement was arrived at regarding payment of wages including Dearness Allowances which had the character of interim relief and a dispute subsequently arose on the question of Dearness Allowance payable to monthly rated and daily rated employees and also about dismissal of certain employees, a reference by the State Government to the Industrial Tribunal was held to be within the scope of Section 10 of the Act.[1]

In *Makhan Singh* v. *Narainpura Co-operative Agricutlural Service Society Ltd. and another*,[2] the service of a Secretary of a Co-operative Society was terminated without conducting a domestic enquiry about the charges of embezzlement made against him. The dispute relating to his termination was referred for adjudication and the Labour Court rejected the claim of the employee after giving a finding that the employee had committed embezzlement and had absented himself from duty without obtaining leave. In support of the charge of embezzlement only photocopies of certain entries were exhibited and originals were not produced before the Labour Court. The management pleaded that the employee was on strike without getting leave. According to the employee photocopies were fabricated document and he was not able to attend to his duties as he was ill. It was held that photocopies of entries cannot be accepted as evidence in the absence of originals to support charge of embezzlement and the question of obtaining leave will not arise when employee is said to have gone on strike. Further there is no reason for not accepting that he was ill and therefore, was not able to attend to his duties. The termination was held to be unjustified and the Society was asked to reinstate the employee with full back-wages. The Labour Court was directed by the Supreme Court to find out whether the employee had worked in any other society after termination of his service as pleaded and if so the amount of back wages shall be reduced by the amount of salary drawn by the employee during the period.

In *Shri Shambu Nath Gopal* v. *Bank of Baroda and others*,[3] a clerk, employed in a bank was dismissed from service on the basis of finding of enquiry officer. The workman wanted certain named persons to be examined as witnesses but the enquiry officer did not allow the request and on the basis of written arguments from both the parties, found the clerk guilty of all charges. Enquiry officer himself proposed the punishment and after hearing the employee dismissed him from service. Enquiry was found defective by the Tribunal on the ground of violation of principles of natural justice. The Management sought an opportunity to lead evidence to justify dismissal but the Tribunal refused to give any opportunity. On a writ petition filed by the management the Delhi High Court disagreed with the view of the Tribunal that the enquiry officer had no authority to impose punishment and remitted the matter to the Tribunal for affording opportunity to the management to give evidence to justify the dismissal, and to decide whether the employee's claim for back wages was justified. The Employees filed an appeal to the Supreme Court against the judgment of High Court. The Supreme Court allowed the appeal and restored the award of the Tribunal directing the reinstatement of the workman with full back wages. The Supreme Court was also of the opinion that when a workman has been punished in consequence of the finding of guilt,

1. *Cooper Engg.* v. *D.S. Aney*, AIR 1973 SC 2232.
2. (1987) 2 Lab LJ 533 (SC).
3. (1983) 2 LLJ 415.

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in the course of the domestic enquiry, there is no question of the management being given an opportunity to lead further evidence in support of the charges framed against the workman at so late a stage. The defect in the domestic enquiry was pointed out by the workman in his written claim statement filed in the Labour Court and the management could have made a request at that stage. He cannot be allowed to do so after 14 years have passed from the time of dismissal because it may result in delay which may lead to wrecking the morale of the workman.

The jurisdiction of the Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and to matters incidental thereto and the Tribunal cannot go beyond the terms of reference. Where the very terms of references showed that the points in dispute between the parties was not the fact of closure of its business by the employers and the references were limited to the narrow question as to whether the closure was proper and justified, the tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquiry into the question whether the business was in fact closed down by the management.[1]

Tribunal's Jurisdiction.—In *Calcutta Port Shramik Union* v. *The Calcutta River Transport Association and others*,[2] the Wage Board set up by the Central Government for Port and Dock Workers in major ports did not make any recommendation in respect of bargemen. Hence an industrial dispute was raised by bargemen claiming the benefit of Wage Board recommendation and the dispute was referred to National Tribunal. The National Tribunal was of the view that bargemen were dock workers and were as such entitled to wages in accordance with Wage Board recommendations. The Calcutta High Court held that the award of the Tribunal was beyond the scope of reference. Hence, this appeal by special leave to the Supreme Court. It was held that the Courts exercising judicial review should attempt to sustain the awards made by the Tribunal as far as possible instead of picking holes in the award on trivial points, ultimately frustrating the entire adjudication process before the Tribunal by striking down awards on hyper-technical grounds. The Tribunal was justified in coming to the conclusion that bargemen were also dock workers and there is no justification in denying them the benefit of the recommendation of the Wage Board. Such award is within its jurisdiction.

In *Kamal Kishore Lakshman* v. *The Management of M/s. Pan American World Airways Inc. and others*,[3] the services of an employee were terminated on the ground of loss of confidence without holding any domestic inquiry. It was held that where no inquiry was held before disciplinary action was taken, it would be open to the employer to ask for such opportunity in the course of adjudication. In case of a workman the termination order could be justified even in the course of adjudication before the appropriate Tribunal even though no enquiry had been conducted earlier.

In *Firestone Tyre and Rubber Co.* v. *Workman*,[4] it was held that where no enquiry has been held or the inquiry is not proper, the Tribunal has jurisdiction to allow the management to lead evidence to justify its action. The tribunal cannot award reinstatement merely because the domestic inquiry was illegal.

In *River Steam Navigation Co.* v. *Second Industrial Tribunal, West Bengal*,[5] the Calcutta High Court held that a writ could not stall the adjudication of an industrial dispute merely on the preliminary questions as to the maintainability of the reference unless it could be shown to the satisfaction of the Court that the reference on the face of it is void and inoperative.

1. *Pottery Mazdoor Panchayat* v. *Perfect Pottery Co.*, AIR 1979 SC 1356.
2. (1989) 1 Lab LJ 223 (SC).
3. (1987) 1 Lab LJ 107 (SC).
4. (1981) 2 LLJ 318 (SC).
5. (1990) Lab IC 675 (Cal).

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In *State of Punjab* v. *Gondhara Transport*,[1] some workmen were dismissed and retrenched by the employer. Out of 60 workmen employed 18 workmen sponsored the cause of dismissed workmen. These 18 included 13 dismissed workers of the Company. The dispute was referred by the State Government to the Labour Court. It was held that the espousing of the cause of the dismissed workmen was only by five workmen who were in actual employment of the Company at that time. Such an espousal could not be considered to be by an appreciable or substantial body of workmen so as to constitute the dispute an industrial dispute. Therefore, the reference by the Government was incompetent. But in view of newly inserted Section 2-A such a reference by the Government is now competent.

In *Ahmedabad, Mills Owners Association* v. *Textile Labour Association Ahmedabad*,[2] it was observed that in trying to recognise and give effect to the demand for a wage including the payment of dearness allowance, to provide for neutralization against the ever increasing rise in the cost of living, industrial adjudication must always take into account the problem of the additional burden which such wage-structure would impose upon the employer and ask itself whether the employer of a factory can reasonably be called upon to bear such burden. This view has been followed by the Delhi High Court in *S.S. Light Rly Co.* v. *Industrial Tribunal*.[3]

Where on the date of reference persons belonging to supervisory staff of a factory come within the definition of workman and the Tribunal has jurisdiction to decide their dispute, it does not cease to continue that jurisdiction merely because the claim made goes beyond the wages which takes workmen out of that category and makes them non-workmen.[4] What has to be seen is whether on the date of reference there was any dispute in respect of the workmen which could be referred under the Act to the Tribunal. If there are no workmen of the category on the date of reference with respect to whom the dispute has been referred, the Tribunal cannot be required to prescribe a wage structure for non-existing workmen, nor does it have jurisdiction to do so.[5]

In *Management of Rangaswamy & Co.* v. *D.V. Jagadish*,[6] the main dispute sought to be decided was that order of removal was null and void. The workman sought interim relief. The employer disputed the status of the concerned person as a workman but Labour Court without deciding whether the individual concerned was a workman or not granted interim relief. It was held that before granting interim relief, the Labour Court ought to have decided the preliminary issue whether claimant was a workman or not.

In case of lay-off the claim of the workmen to receive compensation shall be governed by the provisions of Chapter V-A. But in a reference under Section 10(1) it is open to the Tribunal or the Court to award a lesser sum depending upon the justifiability of the lay-off.[7]

In case of closure of industry or taking over of an undertaking by another subsequent to a reference of an industrial dispute under Section 10 for adjudication, the adjudication does not become abortive specially when it relates to a claim for bonus for past period.[8] If the workmen ask for better conditions of service it would be useless for the Tribunal to complete the adjudication where the industry is not in existence, but where the dispute is over the claim to benefits by way of bonus for the work done in

1. AIR 1975 SC 531.
2. AIR 1966 SC 497.
3. AIR 1971 Delhi 69.
4. *Workmen G.C. & Co.* v. *G.C. & Co.*, AIR 1972 SC 319.
5. *Ibid.*
6. (1992) 1 Lab LJ 133 (Karn).
7. *Workmen F.T. & R. Co.* v. *F.T. & R. Co.*, AIR 1976 SC 1795.
8. *U.P. Electricity Supply Co.* v. *The Workmen*, AIR 1971 SC 2521.

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the past the Tribunal must complete the adjudication and make its award.[1]

Prohibition of strike under Section 10(3).—Before an Appropriate Government can pass an order under Section 10(3) prohibiting a strike two conditions must exist, that is, there must be an industrial dispute and secondly such dispute must have been already referred for adjudication. Where several demands are raised by the workmen but some of them only are referred for adjudication, Section 10(3) cannot operate in regard to such demands as are not referred under Section 10(1) of the Act. If the Government feels that it should prohibit a strike under Section 10(3) it must first refer the demand for adjudication.[2]

In *Sankari Cement Alai Thozhilalar Munnetra Sangam and others* v. *Management of India Cements Ltd. and others*,[3] it was held that where the Government refuses to make a reference of the dispute, for irrelevant reasons the Court can exercise its powers to direct it to refer the dispute for adjudication to the appropriate tribunal.

In *M/s. Agra Electric Supply Company Ltd., Agra* v. *Workmen*,[4] the legality and justification of the retirement of two workmen was referred for adjudication to the Tribunal. Tribunal awarded gratuity based on the practice prevalent in many industries in the region, even though this question was not referred to the Tribunal. When the matter was brought before the Supreme Court in appeal it held that when a reference to a Tribunal is comprehensive enough to cover both the questions of legality and justifiability of retirement it is within the jurisdiction of the Tribunal. The Court further held that in the ordinary law of Contract, when a thing done is legal there is an end of the matter but in industrial law the rigid rules of Contract do not govern the situation and an amount of flexibility in the exercise of powers taking liberties with the strict rights of parties is permitted to tribunals because industrial jurisprudence is an alloy of law and social justice and one cannot be too pedantic in construing the terms of a reference respecting a dispute for industrial adjudication.

In *State Transport Employees Federation, Orissa* v. *State of Orissa*,[5] it was held that Section 10(3) could not operate in respect of disputes which were not referred for adjudication or conciliation. In its opinion to invoke the power under sub-section (3) of Section 10 for making an order prohibiting a strike, two conditions are necessary. First, an industrial dispute in existence and second, the dispute must have been already referred for adjudication.

Res-judicata and reference under Section 10.—Once an industrial dispute is referred for adjudication, a notification seeking to cancel a reference already made was invalid.[6] An award or decision once given on a reference being made should not be disturbed unless there is change in the circumstances after the date of award.[7] So long as an award applicable to the parties is in force a fresh reference of the same question is barred because there is no "industrial dispute" as regards that matter between the parties.

In *Ahmedabad Mfg. and Calico Printing Co. Ltd.* v. *Workmen*,[8] the Management filed a special leave petition to appeal against an award of the tribunal given on a reference made to it. Just after arguments the management withdrew its petition with the permission of the Court. Subsequently a writ petition was filed by the management

1. *U.P. Electricity Supply Co.* v. *The Workmen*, AIR 1971 SC 2521.
2. *Delhi Admn.* v. *Workmen, Edward Keventers*, AIR 1978 SC 976.
3. (1983) 1 LLJ 460 (SC).
4. (1983) 1 LLJ 304 (SC).
5. (1990) Lab IC 1591 (Orissa).
6. *State of Bihar* v. *Ganguli and others*, AIR 1958 SC 1018.
7. *Burn & Co., Calcutta* v. *Their Employees*, AIR 1957 SC 38.
8. (1981) 1 LLJ 489 (SC).

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invoking writ jurisdiction of the High Court. It was held that withdrawal of leave petition would not bar a writ petition under Article 226. Permission to withdraw a leave petition cannot be equated with an order of its dismissal and as such will not operate as *res-judicata.*

Constitutional validity of Section 10.—The validity of this section has been upheld by the Supreme Court holding Section 10 as *intra-vires*. Its validity in *D.C. and G. Mills* v. *Shambhu Nath*,[1] was sought to be challenged on fresh grounds, namely, that Section 10 violated Article 14 of the Constitution. It was held that :

> "Where the Supreme Court has held that Section 10 is *intra-vires* and repelled the objection under Article 14 of the Constitution it would not be permissible to raise the question again by submitting that a new ground could be raised to sustain the objection. It is certainly easy to discover fresh ground of attack to sustain the same objection, but that cannot be permitted once the law has been laid down by the Supreme Court holding that Section 10 of the Act does not violate Article 14 of the Constitution."

Section 10-A. Voluntary reference of disputes to arbitration.—Section 10-A of the Act differs from Section 10 of the Act maily in one respect. Section 10 of the Act provides for reference of an industrial dispute by the Government either on its own or on an application having been made to it by the parties to the dispute. The arbitrator under Section 10 is appointed by the Government making such reference. But Section 10-A of the Act authorises the parties to a dispute themselves to choose their own arbitrator, including a Labour Court, Tribunal or National Tribunal.

Section 10-A (1) provides that where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may refer the dispute to arbitration. Such reference by agreement may be made at any time before the dispute has been referred under Section 10 to a Labour Court, Tribunal or National Tribunal. The agreement, between the parties to an industrial dispute, to make a reference must be in writing. The reference shall be made to such person or persons (including the presiding officer of a Labour Court, Tribunal or National Tribunal) as an arbitrator or arbitrators as may be specified in the arbitration agreement.

Section 10-A (1-A) provides that where an arbitration agreement provides for reference of the dispute to an even number of arbitrators, the agreement shall provide for the appointment of another person as umpire who shall enter upon the reference, if the arbitrators are equally divided in their opinion. The award of the umpire shall prevail and shall be deemed to be an arbitration award for the purpose of this Act.

Section 10-A (2) provides that an arbitration agreement referred to in sub-section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed.

Under Section 10-A (3) a copy of the arbitration agreement shall be forwarded to the Appropriate Government and the conciliation officer, and the Appropriate Government shall within one month from the date of the receipt of such copy publish the same in the Official Gazette.

Sub-section (3-A) provides that where an industrial dispute has been referred to arbitration and the Appropriate Government is satisfied that the persons making the reference represent the majority of each party, the Appropriate Government may, within one month from the date of the receipt of such copy, issue a notification in the prescribed manner. When any such notification is issued the employers and workmen who are not parties to the arbitration agreement but are concerned in the dispute, shall be given an opportunity of presenting their case before the arbitrator or arbitrators.

1. AIR 1978 SC 8.

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Under Section 10-A (4) the arbitrator or arbitrators shall investigate the dispute and submit to the Appropriate Government the arbitration award signed by the arbitrator or all arbitrators as the case may be.

Under sub-section (4-A) where an industrial dispute has been referred to arbitration and a notification has been issued under sub-section (3-A), the Appropriate Government may prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference. The Appropriate Government shall do so by issuing an order.

Sub-section (5) provides that nothing in the Arbitration Act, 1940 shall apply to arbitration under this section.

In *Management N.P.C. Corporation* v. *Their Workmen*,[1] the appellant was engaged in execution of certain projects. There were three categories of workmen in these projects : (1) regular staff, (2) work charged staff, and (3) casual labour borne on muster roll. By a settlement, the question of pay scales of the muster roll workmen was decided and certain other question regarding other categories of workmen were referred to Industrial Tribunal. The Tribunal gave an award allowing 25 per cent increase in the wages of all labour including muster roll workmen and allowed project allowance. As regards the project allowance, the Tribunal took the view that mere fact that the work charged staff and the muster roll staff are appointed for a particular work and some of them happen to be local people should not stand in the way of their getting project allowance and those of these two classes of workmen who come from distant places should be given this allowance in the same way as the members of the regular staff. In appeal the Supreme Court held that "the question of pay scales of the muster roll workmen was decided as a result of the settlement and that was not one of the questions referred to the arbitrator. By the award they would be getting double benefit. Therefore, the award in so far as it granted 25 per cent wage increase to the muster roll workmen beyond its jurisdiction was invalid and was liable to be set aside". The Supreme Court found no jurisdiction for interfering with the award relating to project allowance even though it may be difficult to work it in practice.

An arbitrator functioning under Section 10-A of the Act is a Statutory Tribunal. Award of an arbitrator can be upset in case of an error of law apparent on its face.[2] In a case where the employer claims compensation for losses arising out of an illegal strike, the question whether compensation is to be awarded involves a question of law.[3]

An arbitrator appointed under Section 10-A can re-appraise the evidence led in the domestic inquiry and satisfy himself whether the evidence led by the employer established misconduct against the workman by virtue of the jurisdiction conferred by Section 11-A of the Act. It cannot be contended that the arbitrator has only the power to decide whether the conclusions reached by the enquiry officer were plausible one, deducible from the evidence led in the enquiry and not to appreciate the evidence itself and to reach the conclusion whether the misconduct alleged against the workman has been established or not.[4]

It was held in *Karnal L.K. Sanghatan* v. *Liberty Footwear Company*,[5] that when a dispute is referred for arbitration under an agreement under Section 10-A, the requirement of publication of agreement under sub-section (3) of Section 10-A is mandatory before the arbitrator considers the merits of the dispute. Non compliance of the requirement of publication would render the award invalid and unenforceable.

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1. AIR 1977 SC 283.
2. *Rohtas Industries* v. *Its Union*, AIR 1976 SC 425.
3. *Ibid.*
4. *Rajinder Kumar Kindra* v. *Delhi Administration*, (1984) 2 LLJ 517 (SC).
5. (1989) 2 Lab LJ 530 (SC).

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CHAPTER VI
PROCEDURE, POWERS AND DUTIES OF AUTHORITIES

Section 11. Procedure and Powers of Conciliation Officers, Boards, Courts and Tribunals.—Section 11 of the Act as it stood at the time of its enactment in 1947 has been amended in 1956. Sub-section (1) of Section 11 gives very wide powers to the authorities in so far as the procedure to be followed by them is concerned. This sub-section is worded in general terms. Sub-sections (3), (4) and (7) of this section provide special procedures to be followed in certain cases and to that extent they can be said to curtail the general power with regard to the procedure conferred by sub-section (1).

Section 11(1) provides that subject to any rules that may be made in this behalf, an arbitrator, Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit. These provisions give very wide discretion to the authorities, and the discretion must be exercised with care and caution bearing in mind the principles of natural justice.

Under Section 11(2) a Conciliation Officer or a member of a Board or Court or the Presiding Officer of a Labour Court, Tribunal or National Tribunal may, for the purpose of inquiry into any existing or apprehended industrial dispute, enter the premises occupied by any establishment to which the dispute relates. But before entering the premises such authority must give reasonable notice of its intention to do so.

Sub-section (3) which is in the nature of a proviso to sub-section (1) enacts that every Board, Court, Labour Court, Tribunal and National Tribunal shall have the same powers as are vested in a Civil Court under the Civil Procedure Code, 1908, when trying a suit in respect of the following matters, namely—

(a) enforcing the attendance of any person and examining him on oath ;

(b) compelling the production of documents and material objects ;

(c) issuing commissions for the examination of witnesses ;

(d) in respect of such other matters as may be prescribed.

Every inquiry or investigation by a Board, Labour Court, Tribunal and National Tribunal, shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. Section 193 of the Indian Penal Code deals with giving or fabricating false evidence in a judicial proceeding. Section 228 of the I.P.C. deals with intentional insult or interruption to a public servant acting in any stage of a judicial proceeding. Provisions of sub-section (3) do not refer to a Conciliation Officer.

Sub-section (4) deals specially with the procedure to be followed by the Conciliation Officer. He may enforce the attendance of any person for the purpose of examination of such person or call for and inspect any document which he has ground for considering :

(i) to be relevant to the Industrial Dispute ; or

(ii) to be necessary for the purpose of verifying the implementation of any award ; or

(iii) carrying out any other duty imposed on him under this Act.

For the purposes aforesaid, the Conciliation Officer shall have the same powers as are vested in a Civil Court under the Civil Procedure Code, 1908 in respect of

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enforcing the attendance of any person and examining him or of compelling the production of documents. Conciliation Officer does not have the authority to summon and examine witnesses on oath.

Section 11(5) provides that a Labour Court, Tribunal or National Tribunal may, if it so thinks fit, appoint one or more persons having special knowledge of the matter under consideration as assessor to advise it in the proceeding before it.

Under Section 11(6) all Concillation Officers, members of Board or Court and the Presiding Officers of a Labour Court, Tribunal or National Tribunal shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.

Sub-section (7) deals with the cost to be awarded by the authorities under the Act. The question of awarding cost is expressly declared subject to any rules made under the Act. The cost of any proceeding or the cost incidental to any proceeding before a Labour Court,. Tribunal or National Tribunal shall be in the discretion of authority before which the proceedings are going on. The authority concerned shall have full power to determine by whom and to whom the costs are to be paid. It shall have further power to determine the extent and the conditions subject to which any such costs are to be paid. They are also authorised to give necessary direction as regards the payment of costs. The costs awarded by any authority as aforesaid may, on any application, made to the Appropriate Government by the person entitled, be recovered by that Government as an arrears of land revenue.

Section 11(8) provides that every Labour Court, Tribunal or National Tribunal shall be deemed to be a Civil Court for the purposes of Sections 345, 346 and 348 of the Code of Criminal Procedure, 1973.

Notice to enter premises.—Section 11 of the Act requires the authority to give notice before he comes to the premises. In *State of Bihar* v. *Kripa Shankar Jaiswal*,[1] it was contended that the settlement was illegal and not binding because the Conciliation Officer did not give notice as required under Section 11(2). The Supreme Court held, that the notice is given simply to apprise establishment that it is the Conciliation Officer and not a stranger, who is coming and the absence of a notice does not affect the jurisdiction of a Conciliation Officer.[2]

In another case the workers made a demand to raise the wages on the ground that they had to labour under uncomfortable conditions. They made a request to the adjudicator to visit the factory and satisfy himself personally but the adjudicator declined to do so. The Labour Appellate Tribunal held that—

> "The object of a visit to factory would normally be for the better understanding of the evidence and in order to check by means of inspection the value of the evidence which had been produced. No evidence having been produced in this case it would not be said that the adjudicator was in error in not visiting the factory."[3]

Production of documents before Tribunals.—On a persual of judicial decisions the following principles may be laid down :

(1) The requirements and formalities of the law as laid down in Order 11 of the Civil Procedure Code must be complied with before an application for inspection of account books can be granted.[4]

(2) Inspection of documents and books cannot be permitted to enable one of the

1. AIR 1961 SC 304.
2. *Ibid.*
3. *Workmen Employed by the Firestone Tyres and Rubber Co. Ltd.* v. *Firestone Tyres and Rubber Co. Ltd.*, (1952) 2 LLJ 289 (LAT).
4. *B.N. Jhunjhunwala and Co.* v. *Fifth Industrial Tribunal of West Bengal and others*, AIR 1961 Cal 185.

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parties to undertake a roving enquiry into affairs of the opposite party with a view to fish out material which may be useful.[1]

(3) Authorities under the Industrial Disputes Act cannot order preparation or compilation of statements at the behest of one of the parties by the other.[2]

Cost.—It is beyond any doubt that the Tribunals or the Courts have a discretion to award costs but this power is not ordinarily exercised and Tribunals in practice do not pass orders for costs. Costs are only awarded against a party when his misconduct had made it necessary to meet the ends of justice.[3] Cost is, otherwise rarely awarded, because most of the industrial disputes are raised by the workmen, and if in the event of the case being decided against them costs are awarded they will be further put to greater hardships by paying pecuniary penalties to the employers who are placed in a much better position in comparison with the workmen.

It is also to be noted that costs can only be awarded at the end of the proceeding. In *Punjab National Bank Ltd.* v. *Shri Ram Kumar, Industrial Tribunal Delhi and others*,[4] an application was moved on behalf of the Employees' Federation that the bank should be directed to pay travelling allowances to their representatives attending the adjudication proceedings at Delhi. The Industrial Tribunal ordered some travelling and halting allowance to be paid. But on appeal the Supreme Court held that the powers of an Industrial Tribunal are laid down in Section 11(3). Further, Section 11(7) is very much similar to Section 35 of the Code of Civil Procedure. Therefore, the expression "costs of any proceedings" must mean cost of the entire proceedings as determined on its conclusion and not cost pending proceedings, nor costs to be incurred in future by a party ; and "costs incidental to any proceeding" similarly means costs of interlocutory application and such costs as have been determined thereon, at the conclusion of the hearing.

Provisions of Section 11(7) are worded in so general terms that it cannot be said that costs can be ordered against a party to the proceedings. In *United Commercial Bank Ltd.* v. *Kartar Singh Campbellpuri*,[5] Mr. A.C. Kakkar, who was an employee of the United Commercial Bank represented the employees of several other Banks in a proceeding before an Industrial Tribunal. Neither Mr. Kakkar attended the proceedings in his capacity of a representative of the employees of United Commercial Bank, nor the bank was a party to the proceedings. The United Commercial Bank, was asked to pay the expenses incurred by Shri Kakkar. The Calcutta High Court though admitted that the Court under Section 11(7) has a wide discretion to order the costs against a person who is a party to the proceedings in suitable cases but in the present case the discretion was held to have been exercised wrongly, for the order was passed in violation of the fundamental principles of judicial proceedings, as no opportunity was given to the said Bank to put forward its case.

Thus, inspite of the fact that unlike the provisions of the Civil Procedure Code there is no specific mention in Section 11(7) of the Act that the cost could be awarded only against a party to the proceedings ; it is difficult to imagine those circumstances under which a person, not party to a proceeding can be asked to pay the costs. Therefore, on well recognised principles of judicial procedure, cost can only be awarded against a party to the proceeding.

Granting of adjournments.—Speedy settlement of dispute is the main object of

1. *Kopargon Taluka Sakhar Kamgar Sabha* v. *Chungdeo Sugar Mills Ltd.*, (1956) 2 LLJ 404 (LAT).
2. *Punjab National Bank Ltd.* v. *Ram Kumar and others*, (1957) I LLJ 542 (Punjab).
3. *Aryan Cinema Poona* v. *Workmen*, 1953 LAC 463.
4. AIR 1957 SC 276.
5. AIR 1953 Cal 37.

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the adjudication proceedings under the Act. Therefore only short period adjournments to accommodate the parties may be granted, but no long adjournments are permissible because they may hinder the speedy settlement of the industrial disputes. In *G.C. Bezbama* v. *State of Assam*[1] the Tribunal fixed a particular date for hearing which was later on declared as a holiday. Therefore after a short sitting on that day, the Tribunal adjourned for the next day. The statement of one of the parties was filed on that day and the other party asked for time. The next day when the hearing was resumed, no one appeared on behalf of the petitioner. Therefore, the tribunal had to proceed *ex parte*. The award of the Tribunal was challenged as being opposed to the principles of *natural justice*. It was held that in an adjudication under the Industrial Disputes Act, where speedy settlement is the very essence of the proceedings, it would be futile to expect that long adjournments would be granted for any small step that a party may intend to take.... In the present case the Tribunal sufficiently accommodated the petitioner and had to thank himself if on account of his non-appearance the Tribunal had to adjudicate the dispute and give the award *ex parte*. As such the award was held not to be opposed to natural justice.

Documents produced before Tribunals.—The Tribunal in all matters is not bound by the rules of the Evidence Act but in matters relating to the proof of a document and the claim for privilege, the Tribunal has to abide by the provisions of the Evidence Act. Documents such as balance sheet, etc., which are produced in adjudication proceeding must be proved like any other documents filed in a court of law.[2] Similarly, the Punjab High Court has held that although the Tribunal was not a court, within the meaning of the Evidence Act, it was bound to follow the principles laid down in Sections 123 and 124 of the Indian Evidence Act as these were based on public policy and natural justice.....Rule 18 is a general provision applying to all documents.[3]

Where the Industrial Tribunal has given its decision on the question of dearness allowance without any data adduced as legal evidence before it, it was held that though a Court is not generally entitled to arrive at a finding on any matter except on evidence adduced before it, *quasi judicial* tribunals like the Industrial Tribunal are not hampered by the rules of evidence applicable to proceedings in a court of law, and they would be entitled to rely on data available otherwise than from evidence adduced on behalf of the parties.[4]

Power of the Tribunal to correct errors and to review.—Rule 28 provides that Labour Court, Tribunal, National Tribunal or Arbitrator may correct any clerical mistake or error arising from an accidental slip or omission in any award.[5] In a case the Tribunal in its award declared 36 hours as working hours per week. But in the same award the Tribunal ordered overtime to be paid for all overtime work in between 39 to 48 hours of a week. On an application made by the Union two months after the award pointing out that 39 hours in the award was a mistake for 36 hours, the Tribunal without any notice to the opposite party corrected the error, for it was a clerical error due to an accidental slip which could be corrected under Rule 28. The Supreme Court held that the Tribunal was entitled to correct such error without notice to the appellant.[6] So also in *Shri Meenakshi Mills Ltd.* v. *Their Workmen*,[7] the Supreme Court held that the Labour

1. AIR 1954 Assam 161.
2. *Petlad Turkey Red Dye Works Co. Ltd.* v. *Dye and Chemical Workers Union and others*. (1960) 1 LLJ 548 (SC).
3. *Reserve Bank of India* v. *Central Government Industrial Tribunal, Delhi*. (1959) 1 LLJ 539
4. *Electro Mechanical Industries Ltd.* v. *Industrial Tribunal, Madras*. AIR 1950 Mad 839.
5. The Industrial Disputes (Central) Rules, 1957, R. 28.
6. *Lipton Ltd. and another* v. *Their Employees*. AIR 1959 SC 676.
7. AIR 1958 SC 133.

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Appellate Tribunal had power to review its own order under Order 47 of the Civil Procedure Code. Industrial Tribunal or Labour Court has got an implied power to review its own orders particularly when the orders are only procedural.[1]

Powers of the Tribunal.—The scope of exercise of jurisdiction by Industrial Tribunal in respect of disputes arising from order passed by employers terminating the service of their employees was discussed by the Supreme Court in *Management of Ritz Theatre (Private) Ltd. Delhi* v. *Its Workmen*,[2] and the following principles were laid down :

(1) Where an employer serves the relevant charges on his employee and holds a proper and fair enquiry, it is open to him to act upon the report submitted to him by the Enquiry Officer and to dismiss the employee concerned. If the enquiry has been properly held, the order of dismissal passed against the employee can be challenged only if it is shown that the conclusion reached at the departmental enquiry were perverse or impugned dismissal is vindictive or *mala fide*, and amounts to an unfair labour practice. In such an enquiry before the Tribunal, it is not open to sit in appeal over the findings recorded at the domestic enquiry. When a proper enquiry has been held it would be open to the Enquiry Officer holding the domestic enquiry to deal with the matter on the merits, *bona fide* and come to his own conclusion.

(2) When it appears that the departmental enquiry held by the employer is not fair in the sense that proper charges had not been served on the employee or proper or full opportunity had not been given to the employee to meet the charges, or the enquiry has been affected by other grave irregularities vitiating it, then the position would be that the Tribunal would be entitled to deal with the merits of the dispute as to the dismissal of the employee for itself. The same result follows if no enquiry has been held at all. But in such a case it is open to the employer to adduce additional evidence and the Tribunal would give an opportunity to the employee to meet that evidence and deal with the dispute between the parties in the light of the whole of the evidence thus adduced before it.

The Tribunal has power, under Order 47 of the Civil Procedure Code, to review its own order.[3] In *Workmen of M/s. Williamson Magor & Co. Ltd.* v. *M/s. Williamson Magor & Co. Ltd.*,[4] some junior clerks were promoted superseding the claim of some senior ones. Although in the opinion of the Tribunal the promotions were unjustified, the Tribunal failed to grant any relief to the workmen since there was no standard or norm for promotion. The Supreme Court held that the Industrial Tribunal is intended to adjudicate industrial dispute between the Management and the workmen, settle them and pass effective awards in such a way that industrial peace between the employers and employees may be maintained so that there can be more production to benefit all concerned. For the above purpose, the Industrial Tribunal as far as practicable should not be constrained by the formal rules of law and should avoid inability to arrive at an effective award to meet justice in a particular dispute. The Tribunal in the instant case in view of its findings first of all should have declared that the promotions were illegal and unjustified, their promotions being the result of arbitrary actions of the Management which was nothing but an unfair labour practice and the promotions in question should have been cancelled and the Tribunal in consultation with the Management and the union should have formed norms/rules of promotion and directed the management to give promotions/upgradation in accordance with these norms/rules.

Similarly, objections raised against the employer must be specified and precise to

1. *Amarnath* v. *Swatantra Mills and another*, (1985) 1 LLJ 39 (Delhi).
2. AIR 1953 SC 285.
3. *Shri Meenakshi Mills Ltd.* v. *Its Workman*, AIR 1954 SC 153.
4. (1982) 1 LLJ 33 (SC).

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enable him to meet it. A general that the grounds of retrenchment were false is not specific.[1] The Industrial Tribunals adjudicate industrial disputes relating to any matter specified in the second or the third schedule. The Labour Court has jurisdiction is case of industrial disputes relating to any matter specified in the second schedule only.

In an industrial matter, the fact that the opposite party had not earlier submitted the written statement was not a sufficient ground for the Tribunal to refuse opportunity to that party to examine witnesses when it later on pressed for it. That would be against the principles of natural justice.[2]

In settling disputes between employer and workmen the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper though they may not be within the terms of any existing agreement. It was not merely to interpret and give effect to the contractual rights and obligations of the parties but can create new rights and obligations between them which it considers essential for keeping industrial peace. But it is also paramount that the ultimate object of the industrial adjudication is to help the growth and progress of national economy and it is with that ultimate object in view that industrial disputes are settled by industrial adjudication on principles of fair play and justice.[3]

Where there is a conflict between terms of service agreement and standing orders of employer company, the matter will be governed by the standing orders. Therefore, the termination of service under terms of service agreement without complying with the specific provisions of the standing orders is manifestly illegal.[4] The Labour Court, after coming to the conclusion that the domestic enquiry was not proper should give an opportunity to the employer to produce evidence before it and then come to a final conclusion whether the charges were proved or not.[5]

In *Indian Aluminium Co. Ltd.* v. *Labour Court, Ranchi and Another*,[6] the Patna High Court has held that proviso to Section 11-A does not deprive workman to adduce fresh evidence before the tribunal to make out a case of bias, want of good faith, victimization, violation of natural justice, *mala fides* or unfair labour practice on the part of the management which, if proved would vitiate the domestic inquiry itself. Similarly the management can also adduce fresh evidence to show that the tribunal had no jurisdiction to decide the industrial dispute.

Fixation of wage structure.—In fixation of wage structure a balance has to be struck between the demands of social justice which requires that the workmen should receive their proper share of the national income which they held to produce, with a view to improving their standard of living, and the depletion which every increase in wages makes in the profits as this tends to divert capital from industry into other channels thought to be more profitable. No universal principles can be laid down because the factors which influence the determination of wage structure vary not only from region to region but from industry to industry and establishment to establishment. However, the following questions are relevant for determination of wage structure :

(1) Amount necessary to maintain and improve the standard of living of the workers.

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1. *Management, Hindustan Steel* v. *Workmen*, AIR 1973 SC 878.
2. *Rohtas Industries* v. *R. Industries Mazdoor Sangh*, AIR 1977 SC 1867.
3. *Management of Machkund Hydro-Electric Project* v. *Workmen of Machkund*, (1970) 2 LLJ 73 (Orissa).
4. *S.P. Srivastava* v. *Banaras Electric Light and Power Co. Ltd., Varanasi*, (1970) 1 LLJ 394.
5. *Madhya Pradesh State Road Transport Corporation* v. *Industrial Court, Madhya Pradesh*, (1970) Lab IC 510 (MP).
6. (1991) 1 Lab LJ 328 (Patna).

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(2) A comparison of wages paid to the workers concerned with the wages of similar workers in similar concerns of the region.

(3) The capacity of the industry to bear the burden.

(4) While comparing the establishment with other establishments engaged in the same or like trade in the region the following factors should be kept in view by the Tribunal, namely—

(a) Standing of the establishment,

(b) Strength of labour force employed in that establishment,

(c) Comparative study of profits and losses incurred by them for some preceding years.

(5) A lowest wage limit necessary for bare living must be paid irrespective of the extent of profits, financial condition of the establishment or the availability of workmen on lower wages.

(6) Wages must be fair, sufficient to provide a standard family with food, shelter, clothing, medical care and education of the children appropriate to the workmen but not at a rate exceeding his wage earning capacity in the class of establishment to which he belongs.

Wage fixation is an important subject in any social welfare programme. It cannot be fixed in a vaccum and has necessarily to take note of many factors from real life a worker lives or is reasonably expected to live. In fixing the bare minimum wage or subsistence wage Industrial Tribunals will have to consider the position from the point of view of the workers ; the capacity of the employer to pay such a wage being irrelevant. The fair wage must take note of economic reality of the situation and the minimum needs of the worker with an eye to the preservation of his efficiency as a worker.[1] The capacity of the industry to pay is not a relevant consideration when the rates of minimum wage as distinguished from fair wages are being fixed.[2] But in case of a fair wage the company's capacity to bear the financial burden must receive due consideration. The past performance of the company and the future prospects with a totality of the picture must be present in the mind of adjudicator in deciding a dispute of this nature.[3] Fair wages is not the same as living wage. Fair wage is related to the earning capacity and the work load. Fair wage lies between the minimum wage which must be paid in any event and the living wage.[4]

In fixing the wage structure on a fair basis, an attempt is generally made in assessing the additional liability imposed on the employer by the new wage structure and trying to anticipate whether the employer would be able to meet it for a reasonable long period in future.[5]

A demand for revision of wage structure can be made by the workers on the following grounds :

(1) Increase in the paying capacity of the employer.

(2) Rise in cost of living.

(3) Anomalies, mistakes or errors in the award fixing wage structure.

(4) Rise in wage structure in comparable industries of the Region.

A demand for rise in wage structure should not ordinarily be rejected by the

1. *H.H. Industries* v. *F.H. Lala*, AIR 1974 SC 526 ; *Express Newspapers Ltd.* v. *Union of India*, AIR 1958 SC 578 ; *Kamani Metals and Alloys Ltd.* v. *Workmen*, AIR 1967 SC 1175 ; *Hydro (Engineers) Pvt. Ltd.* v. *Workmen*, AIR 1969 SC 182.
2. *Sangam Press* v. *Workmen*, AIR 1975 SC 2035 and *J.P. Industries* v. *Workmen*, AIR 1972 SC 665.
3. *Sangam Press* v. *Workmen*, AIR 1975 SC 2035.
4. *Express Newspapers Ltd.* v. *Union of India*, AIR 1958 SC 578.
5. *Novex Dry Cleaners* v. *Its Workmen*, (1962) 1 LLJ 271 (SC).

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adjudication on the ground that :

(i) enough time has not passed after the making of the award ; or

(ii) material change in relevant circumstances has not been proved.

It is not possible to lay down any hard and fast rule in the matter. The question as to revision must be examined on merits in each individual case that is brought before adjudicator for an adjudication.[1]

Gratuity.—Gratuity is a kind of retirement benefit like the provident fund or pension. It is regarded as a legitimate claim which workmen can make and which in a proper case can give rise to an industrial dispute. Gratuity paid is intended to help the workmen after retirement whether the retirement benefit is the result of the rules of superannuation or of physical disability.[2] The general principle underlying such gratuity schemes is that, by their length of service, workmen are entitled to claim a certain amount as a retirement benefit. It is a reward for good, efficient and faithful service rendered for a fairly substantial period and it is not paid to the employee gratuitously or merely as a matter of bonus but for long and meritorious service.[3] A claim for gratuity is a claim for retirement benefit and it is not a claim to receive a share of the profits at all, and, so there is no scope for importing the several considerations which are relevant in determining the claim for profit bonus".[4]

No hard and fast period of service can be laid down for qualifying a workman to claim gratuity. It depends upon the facts of each individual case. In *British Paints* v. *Its Workmen*,[5] the period of 5 years provided by the award was changed into 10 years by the Supreme Court on the ground that a fairly long minimum period for qualifying for gratuity in the case of resignation or retirement is necessary to prevent the workmen leaving one concern after another after putting in short minimum service for qualifying for gratuity.

Retirement age in the case of industrial employees.—In fixing the age of retirement the following factors are relevant to be kept in mind :

(1) Nature of work assigned to the employees in the course of the employment.

(2) Nature of the wage-structure applicable to the workmen.

(3) Retirement benefits and other amenities available to the workmen.

(4) Climate of place of work and retirement age fixed in comparable industries in the same region.

(5) General practice prevailing in the past in the industry in respect of retiring its employees.

In *G.M. Talang* v. *Shaw Wallace and Co. Ltd.*[6] the general practice of the Company was to retire its employees at the age of 55, though, in certain cases, the company in its discretion, permitted an employee to continue beyond that age. Later on, agreement was entered into between the company and its employees under which the age of retirement was extended to 58 years subject to the employees passing a medical examination on reaching the age of 55. Shortly after this the employees at Bombay raised a dispute and claimed that no workman should be retired from service before the age of 60 years. In support of their demand, they tried to show that in recent years at least the tendency in comparable concerns in Bombay region has been to fix the retirement age at 60. The Company attempted to show that the trend in Bombay region had not been as claimed. On reference the Industrial Tribunal directed that the age of

1. *Workmen of Balmer Lawrie and Co. Ltd.* v. *Balmer Lawrie and Co. Ltd.*, AIR 1964 SC 278.
2. *Indian Hume Pipe Co. Ltd.* v. *The Workmen*, AIR 1960 SC 251.
3. *M.S. Hydro Engineers (Private) Ltd.* v. *The Workmen*, AIR 1969 SC 182.
4. *Bharat Khand Textile Manufacturing Co. Ltd.* v. *Textile Labour Association*, AIR 1960 SC 833.
5. AIR 1966 SC 732.
6. AIR 1964 SC 1886.

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retirement should be 58, but the Company may, in its discretion and with the express or implied consent of the employee concerned, continue him after that age. The workmen preferred an appeal to the Supreme Court, wherein, it was held that :

> "In a delicate task of adjusting needs of employees to the interests of the employers and what is even more important to the general interests of the country at large, the industrial adjudication has to pay special attention to the prevailing practice in the industrial region concerned. Refusal of similar relief is likely to create discontent and it is the endeavour of industrial adjudication to prevent this."[1]

In another case *M/s. British Paints (India) Ltd.* v. *Its Workmen*,[2] there was no retirement age fixed before reference was made. The Tribunal fixed the age of retirement for clerical and subordinate staff at 60 years and for the workmen in the factory at 55 years. The Supreme Court held that :

(i) As there is no retirement age fixed, the workmen can continue so long as they are physically or mentally fit.

(ii) The age of retirement of the existing workmen should be fixed at 60 years both for the factory workmen as well as head office workmen. There is no reason for making a difference in age of retirement as stated above, unless such difference can be justified on cogent and valid grounds. It is only where work in the factory is of a particularly arduous nature that there may be reason for fixing a lower age of retirement for factory workmen as compared to clerical and subordinate staff.

Incentive Payment Scheme.—Where the Industrial Tribunal had come to a finding that the higher production was mainly due to the increased efforts of the workmen and not due to the modernisation of machinery of installation of additional plant, it could not be said that the Tribunal was wrong in holding that the action of the management in withdrawing the Scheme for payment of 'premium' as incentive for higher production, which was originally applicable to the workmen, was invalid.[3]

Jurisdiction to decide dispute in respect of closure of factory.—The Industrial Tribunal has jurisdiction to decide the dispute in respect of the closure of the factory.[4] In dealing with the question whether the act of closure really amounts to a closure properly so called or it is a lock-out in disguise, the industrial adjudication has to take into account all sorts of evidence, oral and documentary and the ultimate decision has always to depend on a careful examination to the whole of the relevant evidence.[5]

Power of the Tribunal to interfere with the action taken by the management.—The power of the Industrial Tribunal to interfere with the action taken by the management against its employees was discussed by the Supreme Court in *M/s. Khardah and Co. Ltd.* v. *The Workmen*.[6] In this case one Samiran Jadav, an employee of the Khardah Co. Ltd. was dismissed. According to the Company he was properly and validly dismissed, whereas the workmen raised a dispute regarding his dismissal. The dispute was referred to the Tribunal which held the dismissal as unjustified and so directed the appellants to reinstate the employee to his old post within a month from the date of the publication of the award. The respondents pleaded that Jadav had been dismissed by the appellants *mala fide* with the motive of victimising him for his Trade Union activities. The following principles were laid down by the Supreme Court :

1. *G.M. Talang* v. *Shaw Wallace & Co. Ltd.*, AIR 1966 SC 1886.
2. AIR 1966 SC 732.
3. *R.B. Sugar Co. Ltd.* v. *Workmen*, AIR 1972 SC 2292.
4. *Jaya Bharat Tile Works* v. *The State of Madras*, AIR 1953 Mad 30.
5. *Management of Express Newspapers (Private) Ltd.* v. *The Workers*, AIR 1963 SC 569.
6. AIR 1964 SC 719.

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(1) An Industrial Tribunal will not interfere with the action of the management in dismissing its employee after holding an enquiry into his alleged misconduct unless it is shown that the management has not acted in good faith, or that the dismissal amounts to victimisation or to unfair labour practice, or where the management had been guilty of a basic error, or violation of a principle of natural justice or when on the materials the finding is completely baseless or perverse.

(2) If the inquiry is fairly held and leads to the conclusion that the charge framed against the employee is proved, the Industrial Tribunal should not sit in appeal over the finding recorded at the said enquiry and should not interfere with the management's right to dismiss a workman who is found guilty of misconduct.

(3) The failure of the manager to record any findings after holding the enquiry constitutes a serious infirmity in the enquiry itself. The Supreme Court will not consider the evidence itself and decide whether dismissal of the workman is justified or not. If industrial adjudication attaches importance to domestic enquiries and the conclusion reached at the end of such enquiries, this necessarily postulates that the enquiry would be followed by a statement containing the conclusions of the enquiry officer. The enquiry officer must, therefore, record his conclusions clearly and precisely and must also indicate the reasons for reaching the conclusion.

Where the management justifiably alleges that they have ceased to have confidence in the dismissed employee, reinstatement of the employee should not be awarded.[1] But mere lapse of time is not sufficient for refusing reinstatement. The management must show that reinstatement would cause dislocation of work and the Tribunal must take that into consideration.[2]

In *Grindlays Bank Ltd.* v. *Central Government Industrial Tribunal*,[3] the Supreme Court held that the Industrial Tribunal has power to set aside an award passed *ex parte*. Although there is no such express provision in the Act but the Tribunal should be considered to have been given the incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties.

Award of Industrial Tribunal.—Any award of the Industrial Tribunal must be supported with sufficient reasons. "The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdictions is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitratriness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Secondly, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasonable conclusion may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Thirdly, it should be remembered that an appeal generally lies from the decisions of judicial or quasi-judicial authorities to this Court by special leave granted under Article 136. A judgment which does not disclose the reasons, will be of little assistance to the court. The court will have to wade through the entire record and find for itself whether the decision in appeal is right or wrong. In many cases this investment of time and industry will be saved if

1. *Binny Limited* v. *Their Workmen*, AIR 1972 SC 1975.
2. *Ibid.*
3. (1981) I LLJ 327 (SC).

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reasons are given in support of the conclusion. So it is necessary to emphasise that judicial and quasi-judicial authorities should always give the reasons in support of their conclusions."[1] The absence of reasons in support of the conclusions is a serious flaw in an award. But the award cannot be set aside simply on that score, if there is evidence on the record in support of the Tribunal's conclusions.[2]

In *Damodar Valley Corpn* v. *Workmen*,[3] some employees of Damodar Valley Corporation doing construction work were paid construction allowance and the employees doing operational work were not paid any such allowance. On a reference of dispute the National Industrial Tribunal held that the employees who are posted at the same station, some doing construction work and others operational work, both will be entitled to construction allowance as the two sets of employees have to be treated and paid uniformly. This view was upheld by the Supreme Court.

It was held in the *Depot Manager, A.P. SRTC Bus Depot, Kothagudem* v. *Government of A.P. and others*,[4] that even an *ex parte* award should be made on merits of the dispute as if the party is present. No award can be passed straightway without giving a finding on merits of the dispute.

Power of Labour Court.—In *Hindustan Lever Ltd.* v. *Their Workmen*,[5] one Kailash Kumar was employed in the Plant as a temporary Jeep Driver. He was not made permanent when the decision was taken to place the plant on a permanent basis. It was contended that some surplus drivers were to be absorbed in permanent vacancies but no evidence was produced as to who were the surplus hands. It was held that Kailash Kumar was the only eligible hand and refusal to confirm him was an unfair labour practice and the Labour Court could direct the employer to confirm him in the post.

In *L. Michael* v. *Johnson Pumps Ltd.*,[6] Michael a permanent employee of the respondent company was discharged after giving one month's notice pay, in accordance with the terms of employment letter. The Management for the first time revealed before the Labour Court that loss of confidence in employee prompted their action as he was an intractable smuggler of inside information. On the other hand the worker claimed that he had been victimised for his trade union activities. It was held that the impugned action was not *bona fide*. Some testimony of unseemly attempts by the workman to get at secrets outside his orbit, some indication of the source of suspicion, some proof of the sensitive or strategic role of employee, should and would have been forthcoming had the case been *bona fide*. It was further observed that the Tribunal has power, indeed the duty, to x-ray the order and discover its true nature. Loss of confidence is a subjective feeling or individual reaction to an objective set of facts and motivations. The court is concerned with the latter and not the former. An employer, who believes or suspects that his employee, holding a high position of confidence has betrayed that confidence, can terminate his employment but such belief or suspicion should not be a mere whim or fancy. It should be *bona fide* and reasonable. It must rest on some tangible basis and the power should be exercised by the employer objectively.

In *T. Muthusamy* v. *P.O., Labour Court, Coimbatore and another*,[7] the appellant was dismissed for misconduct after holding domestic inquiry. But keeping in view the mitigating circumstances and the fact that out of four charges proved only one was of serious nature, the labour court ordered reinstatement of the employee without back

1. *Woolcombers of India* v. *Their Workers Union*, AIR 1973 SC 2758.
2. *Ibid.*
3. *Damodar Valley Corpn.* v. *Workmen*, AIR 1973 SC 2292.
4. (1991) 1 Lab LJ 235 (AP).
5. AIR 1974 SC 769.
6. AIR 1974 SC 661.
7. (1991) 2 Lab LJ 405 (Mad).

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wages. In its opinion the charges proved do not warrant the extreme punishment of dismissal. The award was set aside by single judge of the High Court. Hence this appeal. It was held that the exercise of discretion by the Labour Court is proper and judicious and Section 11-A of the Act confers a wide discretion on the Labour Court or Tribunal.

Power of High Court to issue writ against decisions of the Tribunal.—The High Courts have under Article 226 of the Constitution power to issue writs of *certiorari* for quashing the decision of a Tribunal. In *H.V. Kamath* v. *Syed Ahmed Ishaque*,[1] the following principles were laid down :

(1) Writ of *certiorari* will be issued for correction of jurisdiction, as and when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) The writ of *certiorari* will also lie when the Court or Tribunal acts illegally in the excess of its undoubted jurisdiction.

(3) The Court issuing a writ of *certiorari* acts in exercise of a supervisory and appellate jurisdiction.

(4) The writ of *certiorari* could be issued to correct an error of law which is manifest on the face of the record.

Special leave under Article 136 of the Constitution against the decision of the Industrial Tribunal.—The scope of power of the Supreme Court under Article 136 of the Constitution vis-a-vis awards of Tribunals was discussed by the Supreme Court in *Bengal Chemical and Pharmaceutical Works Ltd.* v. *Their Workmen*.[2] In this case the Supreme Court observed that :

> "Article 136 does not confer a right of appeal to any party from the decision of any tribunal, but it confers a discretionary power on the Supreme Court to grant special leave to appeal from the order of any tribunal in the territory of India. It is implicit in the discretionary reserve power that it cannot be exhaustively defined. It cannot obviously be so construed as to confer a right to a party where he has none under the law. The Industrial Disputes Act is intended to be self-contained one and seek to achieve social justice on the basis of the collective bargaining, conciliation and arbitration. Awards are given on circumstances peculiar to each dispute and the tribunals are, to a large extent, free from the restrictions of technical considerations imposed on the Courts. A free and liberal exercise of the power under the Article may materially affect fundamental basis of such decisions, namely, quick solution to such disputes to achieve industrial peace."

Though Article 136 is couched in the widest terms, it is necessary for the Supreme Court to exercise discretionary jurisdiction only where[3] :

(i) Awards are made in violation of the principles of natural justice, causing substantial and grave injustice to parties ; or

(ii) the case raises an important principle of industrial law requiring elucidation and final decision by the Supreme Court ; or

(iii) the case disclose such other exceptional or special circumstances which merit the consideration of Supreme Court.

The Supreme Court is not a regular Court of Appeal against the orders of the tribunals.[4] An appeal against the award of the Industrial Tribunal brought by special leave is not an appeal as of right. It is not intended to be an appeal on every ground of

1. AIR 1955 SC 233.
2. AIR 1959 SC 633.
3. *Bengal Chemical & Pharmaceutical Works Ltd.* v. *Their Workmen*, AIR 1959 SC 633.
4. *Hindustan Antibiotics Ltd.* v. *The Workmen*, AIR 1967 SC 948.

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fact and of law unless the Supreme Court considers it fit to examine the matter from any special angle.[1] Before a party can claim redress it must show that the award is defective by reason of an excess of jurisdiction, a substantial error in applying the law of some settled principles ; or some gross and palpable error occasioning substantial injustice.[2] An industrial adjudication cannot be assailed because some other person would be given a different award or elaborate reasons have not been given.[3]

In *Management of Wenger and Co.* v. *Their Workmen*,[4] it was held that—

> "When the Supreme Court entertains appeals in industrial matters under Article 136 of the Constitution, it does not act as Court of appeal on facts. It is only where general questions of law are raised that the Supreme Court feels called upon to pronounce its decisions on them for the guidance of industrial adjudication in India. The decisions of the Industrial Tribunals on the question of fact and their conclusions in the matters within their discretion are not usually revised by the Supreme Court."

Section 11-A. Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen.—Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and in the course of the adjudication proceeding, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of the lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require :

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

Section 11-A is prospective in its operation and applies only to disputes referred for adjudication on or after the date of its coming into force. The mere fact that the domestic inquiry held against the workman is defective or no inquiry has been held at all does not by itself render the dismissal of workman illegal. Proviso to Section 11-A does not take away the right of the employer to adduce evidence justifying his action. Even where the dismissal of a workman by an employer on ground of misconduct is preceded by a proper and valid domestic inquiry Section 11-A now empowers the Labour Court or Tribunal to reappraise the evidence and examine the correctness of the finding arrived at the domestic inquiry.[5] Section 11-A further empowers the Tribunals to interfere with the punishment and alter the same.[6] Interference by the Industrial Tribunal under the section, with decision of the employer will be justified only when the enquiry is unfair, or the findings arrived at are perverse or have no basis in evidence or the management is guilty of victimising, unfair labour practice or *mala fide* or the punishment is harsh or oppressive.[7] But an award by an arbitrator cannot be challenged on any procedural ground.[8]

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1. *Kamani Metal and Alloys Ltd.* v. *The Workmen*, AIR 1967 SC 1175.
2. *Ibid.*
3. *Ibid.*
4. AIR 1964 SC 864.
5. *Workmen of F.T. & R. Co.* v. *The Management*, AIR 1972 SC 1227.
6. *Ibid.*
7. *East India Hotels* v. *Their Workmen*, AIR 1974 SC 696.
8. *Management of the National Projects Construction Corporation Ltd. Bhagalpur* v. *Their Workmen*, 1970 Lab IC 907 (Pat).

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In *Gujarat Steel Tubes Ltd.* v. *G.S.T. Mazdoor Sabha*,[1] the workmen of the appellant went on a total strike and in consequence the management terminated their services. The matter was referred to Arbitrator under Section 10-A who upheld the action of the management. On appeal the High Court reversed the Arbitrators award and hence an appeal was moved to the Supreme Court. The question for consideration was whether Arbitrators appointed under Section 10-A enjoy the powers conferred by Section 11-A. It was held by the majority that Section 11-A applies to the Arbitrators in the present case and he has the power to examine whether the punishment imposed in the instant case is excessive. The High Court also has similar powers if the award suffers from a fundamental flaw. In reaching this conclusion their lordships examined the objects and reasons underlying the enactment. It may be submitted that the majority view held by Mr. J. Koshal appears to be more correct, who has taken the view that the language employed in Section 11-A is clear and unambiguous and is capable of only one meaning, *i.e.*, the word 'tribunal' in this section is used in the sense in which it is used in Section 2(r). Thus powers given to a tribunal under Section 11-A are not exercisable by an Arbitrator and he cannot, therefore, interfere with the punishment awarded by the employer.

In *Hindustan Machine Tools Limited, Bangalore* v. *Mohd. Usman & another*[2] it was held that Section 11-A confers power on the Labour Court to evaluate the severity of misconduct and to assess whether punishment imposed by the employer is commensurate with the gravity of the misconduct. If the Labour Court after evaluating the gravity of the misconduct held that punishment of termination of service is disproportionately heavy in relation to misconduct and exercised its discretion, the Supreme Court in the absence of any important legal principles would not undertake to re-examine the question of adequacy or inadequacy of material for interference by Labour Court.

In *M/s. Mukund Engineering Works* v. *Bansi Purshotam*,[3] it was held that when once a misconduct alleged against the workman is proved, no reinstatement can be ordered with back wages. The workman should be bound to opt for either reinstatement with no back wages or just backwages without reinstatement.

This section confers powers on the Tribunal not only to examine the order of discharge or dismissal on merit but also to determine whether the punishment was commensurate with the gravity of misconduct charged. It confers powers on the Tribunal and Labour Court to examine the case of the terminated workman qualitatively in the nature of enquiry and quantitatively in the matter of adequacy or otherwise of punishment.[4]

Section 12. Duties of Conciliation Officers.—The duties of a Conciliation Officer as laid down in Section 12(1) are of two kinds, namely, discretionary and mandatory. His duties are :

(i) Where any industrial dispute exists or is apprehended in any industrial establishment the conciliation officer may hold conciliation proceedings in the prescribed manner.

(ii) Where the dispute relates to a public utility service and a notice under Section 22 has been given, the conciliation officer shall hold conciliation proceeding in the prescribed manner.

Thus in the former case the duty imposed upon the Conciliation Officer is only discretionary and that too is dependent upon one or the other of the two exigencies,

1. (1980) 1 LLJ 137 (SC).
2. (1983) 2 LLJ 386 (SC).
3. (1995) 2 Lab LJ 62 (SC).
4. *Ram Avtar Sharma and another* v. *State of Haryana and another* (1985) 2 LLJ 187 (SC).

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namely, the existence or apprehension of the industrial dispute. In the latter case, on the satisfaction of the two conditions (*i.e.*, if dispute relates to a public utility service and a notice under Section 22 has been given), it shall be obligatory for him to hold conciliation proceedings.

What the conciliation officer shall do for the purpose of bringing about a settlement of the dispute is stated in Section 12(2). He shall without any delay investigate the dispute and all matters affecting the merits and the right settlement of the dispute. He may also do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. He shall try to find out the points of difference between the parties, ascertain the grounds on which respective claims are based and explore the possibilities to settle the differences. He shall persuade the parties to avoid any conflict. Practically he has no power to pass any independent order. He is not competent to adjudicate upon the dispute between the management and the workmen.[1] His authority is based on the response of the parties to his move to bring them together and to bridge the gap existing between them. Both parties are generally eager to end their differences, because continuance of a dispute may prove costly to both, the workmen and the employer. If the employer does not submit to his pursuation, the dispute may under Section 12(3) be referred to Board, Court or Tribunal. Therefore, even the employer welcomes the intervention of the Conciliation Officer.

Section 12(3) provides that if a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings, the Conciliation Officer shall send a report thereof. The report of the settlement shall be submitted to the Appropriate Government or to an officer authorised in this behalf by the Appropriate Government. The report shall also be accompanied with a memorandum of the settlement. The memorandum shall be signed by the parties to the dispute.

In case no settlement is arrived at, the conciliation officer shall, as soon as practicable, after the close of investigation, send the case to the Appropriate Government. He shall send :

(a) a full report setting forth the steps taken by him for ascertaining the facts and circumstances resulting to the dispute and for bringing about a settlement of the dispute ; and

(b) a full statement of such facts and circumstances and the reasons on account of which in his opinion, a settlement could not be arrived at.

The report is sent for consideration of the case by the Government. Therefore, if on a consideration of the report, the Appropriate Government is satisfied that there is a case for reference to Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the Appropriate Government does not make a reference, it shall record and communicate to the parties concerned the reasons for not making the reference. The refusal of the Government to refer the dispute for adjudication must be based on sound considerations relevant to the facts of the case. If the Appropriate Government decides not to make a reference and at the same time fails to record the reasons thereof, the court can by issuing a writ direct the Government to fulfil its obligation which such government owes under the Act.

Section 12(6) provides that the report shall be submitted within fourteen days of the commencement of conciliation proceedings or within shorter period as may be fixed by the Appropriate Government. However, the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the

1. *The General Manager, Security Paper Mills, Hoshangabad* v. *R.S. Sharma and others*, (1986) Lab. LJ 432 (SC).

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dispute. But any such extension, in order to be valid must be approved by the Conciliation Officer. In other words, the extension of the time of submission of report is possible only with the approval of the Conciliation Officer and agreement of the parties, which must be in writing.

Powers of Conciliation Officer.—The fundamental basis for the exercise of power by the Conciliation Officer under this section is the existence or apprehension of an industrial dispute. Where neither an industrial dispute exists nor it is apprhended the Conciliation Officer shall have no jurisdiction to act. If an industrial and not an individual dispute exists or is apprehended the Conciliation Officer may investigate into the causes of such a dispute with a view to bring reconciliation between the parties. He does not adjudicate upon the rights of the parties. Therefore, he need not serve any notice on the parties if he wishes to visit the premises of an establishment to which the dispute refers.[1]

The Conciliation Officer under Section 12(1) has in one case option to hold conciliation proceedings, while in others, on fulfilment of the two conditions mentioned in the latter part of that sub-section it shall be obligatory for him to hold conciliation proceedings. Where Conciliation Officer receives any information about an existing or apprehended industrial dispute which does not relate to public utility service and he considers it necessary to intervene in the dispute, he shall give formal intimation in writing to the parties concerned declaring his intention to commence conciliation proceedings with effect from such date as may be specified therein.[2]

In *M/s. Juggat Pharma (P) Ltd.* v. *Deputy Commissioner of Labour, Madras*[3] the services of workmen who were employed in Madras as sales representatives were terminated. The petitioner had its establishment at Bangalore and had no branch office in Madras. It was held that the fact that the petitioner had no office at Madras does not alter the fact that the termination of the workmen's services is connected with their employment in Madras. If a cause of action could arise where the contract was concluded, a dispute could arise where the contract of employment was terminated. Therefore, Deputy Commissioner of Labour Madras could initiate conciliation proceedings under Section 12(1) of the Act.

The effect of sub-section (2), (3) and (4) is that all that a Conciliation Officer can do is to induce the parties to agree to a settlement or to report his failure to bring about a settlement and in the absence of a settlement he has no authority under the law to pass any final order.[4]

Conciliation Proceedings and settlement.—The workmen of Caltex Oil Company raised a demand pertaining to their conditions of employment. The Conciliation Officer made a report of his failure to bring about a settlement to the Government. Thereafter the Additional Secretary to the Ministry of Labour by a letter asked both the management and the union of the workmen to see the Labour Minister. A settlement was arrived at between the parties and was signed by both the parties and the Conciliation Officer. It was held that the Minister was not a Conciliation Officer and the settlement which was arrived at due to his good offices could not be said to be a settlement arrived at in the course of conciliation proceedings.[5]

In another case there was an industrial dispute and a strike in consequence thereof. A settlement was arrived at in the presence of the Labour Commissioner as a result of

1. *K. Syed Gani* v. *State of Madras*, (1960-61) 18 FJR 315 (Mad).
2. The Industrial Disputes (Central) Rules, 1957, R. 10.
3. (1982) 2 LLJ 71 (Karn).
4. *Sasamusa Sugar Works Ltd.* v. *The State of Bihar*, AIR 1955 Pat 49.
5. *Employees of Caltex (India) Ltd.* v. *Commissioner of Labour and another*, (1959-60) 16 FJR 106 (Mad).

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conciliation proceedings. It was agreed to refer certain dispute to the Labour Officer and the strike was in the meanwhile to be called off. The Punjab High Court in this case held that there was nothing improper in such a settlement ; it allowed tempers to cool down, and a lasting settlement to be arrived at and, therefore, the settlement was legal and binding on the parties.[1]

Power of Government to make a reference.—This sub-section authorises the Government either to make or not to make a reference. The Government is authorised to examine the report and see whether there is a case for reference or not. If it is satisfied that there is no case for reference it shall record the reasons therefor. But if the Government feels that there is a case for reference, can it even then refuse to refer the dispute ? On a plain reading of this sub-section the Government can still refuse to make a reference. There is a good deal of controversy over this point and the matter had been discussed by the Supreme Court in the *State of Bombay* v. *K.P. Krishnan.*[2] The workmen of Firestone Tyre and Rubber Co. India, Ltd., made four demands to the Company. Two of these demands were taken up by the Conciliation Officer but his efforts to bring about a settlement could not be successful, therefore he submitted his report of failure to the Government. The Government after considering the report decided not to make a reference because the workmen resorted to "go slow" during the year in question. The workmen moved a writ petition to the Bombay High Court which held that the reason given by the Government for refusing to make a reference was so extraneous that it was no reason at all. On appeal the Supreme Court held that :

(1) Section 12(5) does not by itself and independently of Section 10(1) confer power on the Appropriate Government to make a reference. When Section 12(5) says that Government may make a reference, it really means that it may make a reference under Section 10(1). The words of Section 12(5) do not suggest that the report of the Conciliation Officer is the only material on which the Government may base its conclusion ; the Government may consider all the relevant circumstances.

(2) Under Section 12(5), clause (a), the question for consideration of Government is whether there is a case for reference. If the Government comes to the conclusion that a *prima facie* case for reference has been made then it would be open to the Government to consider whether there are any other relevant or material facts which would justify its refusal to make a reference.

(3) If the Court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane then the Court can issue and would be justified in issuing a writ of *mandamus* even in respect of such an administrative order.

Where the dispute is on many points, the Government may make a reference in respect of some of the matters and omit others. It was held in *Papnasam Labour Union* v. *State of Madras*,[3] wherein, memorandum of demands was submitted by the Union of Madurai Mills, but the Government referred only some of the items included in the memorandum, for adjudication, that "Whether Section 12(5) or Section 10(1) applies, the Government has in both the cases a discretion to refer some items in dispute and to decline to refer the others. But at the same time if the Government decides not to refer the whole of the matter, the reasons for not referring the other issues must be recorded and if it is not done the court can issue a direction to the Government to record the

1. *Amin Chand Pyarelal* v. *Second Punjab Industrial Tribunal*, (1958) 1 LLJ 604.
2. AIR 1960 SC 1223.
3. (1959) 1 LLJ 526.

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reasons and to communicate it to the parties concerned,[1] because under Section 12(5) a duty is cast upon the Government to record the reasons for not making a reference after consideration of the report of the Conciliation Officer.

If the Labour Commissioner had declined to make reference stating that the employee was not a workman, he can be directed by the Court to make reference under this section if adequate reasons can be shown.[2]

Where the State Government on receipt of the report of the Conciliation Officer had found that the petitioner was not a workman and, therefore, the case was not fit for reference, it was held that the State could not be asked by a writ of *mandamus* to make a reference under Section 10(1).[3]

In *Ram Pukar Singh and others* v. *Heavy Engineering Corporation and others*,[4] a settlement was arrived between the union and management on May 14, 1987 and the petitioners received the benefit arising out of it. Later on there was another agreement in 1990 and the petitioners in this petition contended that they were working in supervisory category and were not workmen. Secondly they were not members of the union with which the settlement was made, therefore they were not bound by the settlement. It was held that these contentions had no substance because the petitioners received the benefit of arrears of salary and revised pay scales in consequence of 1987 settlement. Therefore they had continued to be workmen and there was only one union representing all workmen during the relevant period. The settlement dated 13 September 1990 was under Section 12(3) read with Section 18 of the Industrial Disputes Act and it was binding on all the workmen whether they were members of the union or not. Under the settlement it is solemnly agreed that they would not claim any arrears till October 13, 1990 on which day the petitioners were appointed to the post of Assistant Personal Officer.

In *Associated Glass Industries Ltd.* v. *Industrial Tribunal, A.P. and others*,[5] the petitioner resisted the reference on the ground that the union representing eleven workmen had settled the claim under Section 12(3) and in pursuance of the settlement the workmen have resigned and received terminal benefits. The workmen later raised a plea that they did not resign voluntarily. It was held that if the settlement reached under Section 12(3) is not vitiated by fraud, misrepresentation or coercion and when they have received the terminal benefit, the settlement is binding on them. Therefore the reference is bad in law.

In *Village Papers Mazdoor Sangh Mehatpur* v. *State of H.P. and others*,[6] the employer company was served with demand notice by the workmen's union. The company suspended a number of workmen during the pendency of the conciliation proceedings. The company started disciplinary proceedings against certain workers and services of 30 workers were terminated. Therefore the Conciliation Officer submitted a failure report which was endorsed by the Labour Commissioner. The proceedings ended in failure on account of the absence of either party. The state government made a reference for determining the justifiability of the termination of service of the workmen and relief to be granted. The High Court quashed the reference on the ground that since no demand was made by workmen there was no dispute in existence under Section 2(k) of the Act. It was held by the Supreme Court that the *sine qua non* for making a reference under Section 12(5) of the Act is the existence of failure report from the

1. *Shri Chitra Mill Workers Union* v. *State of Kerala and another*, (1958) 1 LLJ 295 (Kerala).
2. *Nirmal Singh* v. *State of Punjab and others*, (1984) 2 LLJ 396 (SC).
3. *Prem Kakar* v. *State of Haryana*, AIR 1976 SC 1474.
4. (1995) 1 LLJ 214 (SC).
5. (1990) 1 Lab LJ 323 (AP).
6. (1995) 2 Lab LJ 628 (SC).

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Conciliation Officer. In this case there were prolonged proceedings which ended in failure. The condition precedent under Section 12(5) of the Act was fully satisfied and hence the State Government was justified in making a reference.

Submission of report by Conciliation Officer.—This sub-section enjoins the Conciliation Officer to submit his report within 14 days or any other shorter period as fixed by the Appropriate Government. Where the conciliation proceedings are continued beyond a period of 14 days and the report had not been sent within the prescribed time, the proceedings were still held to be valid because contravention of Section 12(6) may amount to a breach of duty on the part of the Conciliation Officer but that does not affect the legality of proceedings.[1]

Conciliation proceedings during subsisting settlement and after closure of a business.—A settlement between the parties is a voluntary matter, but when a settlement is arrived at between the parties the law gives to it a greater sanctity than it gives to an award and therefore, industrial law does not contemplate any interference with the finality of settlement and compels a settlement to run on and neither party is permitted to challenge that settlement during its duration.[2] Conciliation proceedings may be held even after the closure of a business and settlement arrived at to refer the dispute to a Tribunal shall be valid, provided the dispute relates to a date prior to the closure of the business.[3]

Section 13. Duties of Boards.—Section 13(1) provides that where a dispute has been referred to a Board under this Act, it shall be the duty of the Board to endeavour to bring about a settlement of the same. For the purpose of bringing about a settlement, the Board shall, if it thinks fit and without any delay, investigate the dispute and all matters affecting the merits and the right settlement of the dispute. The Board may do all things as it thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

Section 13(2) lays down that if a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings, the Board shall send a report thereof to the Appropriate Government together with a memorandum of the settlement signed by the parties to the dispute.

If no such settlement is arrived at, the Board shall, as soon as practicable after the close of the investigation, send to the Appropriate Government a full report setting forth the proceedings and setps taken by the Board for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof. The report shall be accompanied with a full statement thereof. The report shall be accompanied with a full statement of such facts and circumstances, its finding thereon, the reasons on account of which, in its opinion, a settlement could not be arrived at. The Board shall also send its recommendations for the determination of the dispute.

Section 13(4) provides that, if on the receipt of a report under sub-section (3) in respect of a dispute relating to a public utility service, the Appropriate Government does not make a reference to a Labour Court, Tribunal or National Tribunal under Section 10, it shall record and communicate to the parties concerned its reasons therefor. Provisions of this sub-section are very much similar to the provision of Section 12(5). Therefore comments with regard to Section 12(5) of the Act shall with equal force apply to this sub-section also.

Section 13(5) is very much similar to the provisions of Section 12(6). In case of Section 12(6) the Conciliation Officer is required to submit his report within fourteen

1. *State of Bihar* v. *Kripa Shanker Jaiswal*, AIR 1961 SC 340.
2. *Poona Mazdoor Sabha* v. *G.K. Dhutia and another*, AIR 1956 Bom 745.
3. *Jai Bharat Woolen and Silk Mills* v. *Industrial Tribunal, Punjab and others*, (1957) 2 LLJ 464.

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days ; under Section 13(5) the Board shall submit its report within two months of the date on which the dispute was referred to it or within such shorter period as may be fixed by the Appropriate Government. There are two provisos to this sub-section. According to one, the Appropriate Government may from time to time extend the time for the submission of the report by such further period not exceeding two months in the aggregate. The second proviso provides that the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute.

Section 13 differs from Section 12 in one important respect. The Board has jurisdiction to hold conciliation proceeding only when a dispute is referred to it by the Appropriate Government. The Conciliation Officer on the happening of one of the two contingencies provided in Section 12(1), shall hold conciliation proceedings if the dispute relates to public utility service ; in other cases he has an option to hold or not to hold conciliation proceedings.

Both the Conciliation Officer and the Board are required to submit a report to the Government if a settlement is arrived at, alongwith a memorandum of settlement signed by both the parties. If no settlement is arrived at, a report of the failure shall be submitted to the Appropriate Government under both the sections.

Section 14. Duties of Courts.—Section 14 of the Act deals with the duties of the Court. The exercise of jurisdiction by the Court of Inquiry is subject to a reference having been made by the Appropriate Government regarding any matter appearing to be connected with or relevant to an industrial dispute, existing or apprehended. The reference shall be made under Section 10(1) of the Act. The procedure and powers of a Court of Inquiry are laid down in Section 11. The duties of a Court of Inquiry as laid down in Section 14 of the Act are :

(i) to enquire into the matter referred to it by the Appropriate Government ;

(ii) to make a report to the Appropriate Government on the enquiry held on matters referred to it.

Ordinarily, the report shall be submitted within a period of six months from the commencement of the enquiry. However, this provision seems only to be directory in nature and continuance of proceedings beyond six months will not affect the legality of the proceedings.

In *J.B. Sanjeev Rao* v. *Industrial Tribunal-cum-Labour Court and another*,[1] it was held that in a case where the findings of domestic inquiry are challenged the Labour Court cannot *suo motu* direct the management to adduce evidence in the absence of any request either oral or written from the management. In case the management wants to adduce further evidence, it should necessarily ask for such an opportunity in the written statement itself or in any case it can make a request immediately after the Labour Court finds that the domestic inquiry is vitiated or invalid.

Section 15. Duties of Labour Courts, Tribunals and National Tribunals.—The power of adjudication into the industrial disputes is under this Act vested in Labour Court, Industrial Tribunal and National Tribunal. The exercise of power of adjudication by these bodies is subject to a reference being made by the Appropriate Government regarding any dispute or any matter appearing to be concerned with or relevant to the dispute, if it relates to any matter specified in the Second Schedule of the Act. These bodies discharge their functions very near to those of courts, although they are not courts in the technical sense of the term. They decide the claims of respective parties and in doing so they apply the principles of the natural justice. They have all trappings of a court and perform functions which are not regarded as

1. (1995) 2 Andhra LJ 872 (A.P.)

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judicial. The decisions given by these bodies are not 'award' in the sense the word is used in the Arbitration Act, 1949. The duties of these bodies as laid down by Section 15 of the Act are two fold :

(i) to hold adjudication proceedings expeditiously ; and

(ii) to submit its award to the Appropriate Government within the period specified in the order referring such industrial dispute or the further period extended under the second proviso to sub-section (2-A) of Section 10.

In order to enable these bodies to hold adjudication proceedings a valid reference under Section 10 is necessary. The exercise of jurisdiction by these bodies is subject to a reference being made to it. Further the dispute referred to adjudication must strictly be an industrial dispute and conform the requirements of Section 2(k) of the Act. If any question is raised regarding the validity of reference, it shall be decided by the authority to whom the refernece is made.

Parties to make available all relevant papers for proper decision of dispute.—It was held in *Workmen of Joint Steamer Companies* v. *Joint Steamer Companies*[1] that the employers and workmen both should make available to industrial adjudication all relevant papers including account books which are likely to assist a proper decision of the question in issue. Where the workmen or their representatives ask for inspection of such paper and account books, it should ordinarily be complied with subject of course to protection under Section 21 of the Act. When any such request is made the Tribunal shall exercise its discretion and in the absence of any special circumstances would ordinarily be justified in asking the employers to give to the workmen reasonable access to all relevant papers.

Jurisdiction and powers of Tribunal and Court.—The jurisdiction of Industrial Tribunal is not limited to merely administering existing law and enforcing existing contract. It can vary contracts of service between employer and the employees.[2] When a reference under Section 10(1)(c) has been made by the Government to a Labour Court, it has every right to see whether a dispute within the meaning of Section 2(k) has arisen or not. The court can examine whether there was a master and servant relationship between the employer and the employee, or the employee was a workman, or there exists an industrial dispute. These issues are collateral ones but it is their determination that confers jurisdiction upon the Labour Court to deal with the main reference. These collateral matters are to be decided by the Labour Court itself and no writ can be issued by the High Court in respect of these questions.[3]

The Court or Tribunal does not act as a court of appeal against the decisions of the domestic inquiry. It may interfere with the finding of a domestic or a managerial inquiy when[4] :

(i) there is want of good faith, *i.e.*, where employer is actuated by *mala fides* ; or

(ii) there is victimisation and unfair labour practice ; or

(iii) the management has been guilty of basic error or violation of principle of natural justice ; or

(iv) on the materials the finding is completely baseless or perverse ; or

(v) the acts of the employer or the finding of the inquiry is *ultra vires, e.g.*, contrary to the Standing Orders ; or

1. (1969) 1 SCJ 330.
2. *Co-operative Central Bank Ltd.* v. *Additional Industrial Tribunal Andhra Pradesh*, AIR 1970 SC 245.
3. *Nagrathnem* v. *State of Madras*, (1965) 1 LLJ 84.
4. *For William Jute Mills Co. Ltd.* v. *First Labour Court*, (1963) 1 LLJ 374.

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(vi) where the penalty imposed is shockingly disproportionate to the charge found against the workman.[1]

The finding of fact based on evidence arrived at by domestic Tribunal cannot be ignored by a Labour Court.[2] Ordinarily promotion of a workman from a lower grade to a higher grade is managerial function and the Labour Court cannot arrogate to itself the discharge of this function in the absence of finding that the management refused to promote a workman on account of his trade union activities or unfair labour practice.[3] What is unfair labour practice or victimisation is a question of fact to be decided by a Labour Court or Tribunal upon the circumstances of each case. Unjust dismissal, unmerited promotion, partiality towards one set of workers regardless of merits are all unfair labour practices.[4] If an employer deliberately uses his power of promoting employees in a manner calculated to undermine the strength of their union, he is certainly guilty of unfair labour practice.[5]

Even where it is found that the domestic inquiry held by the employer is, due to some omission or deficiency, not valid, the employer can support the order of dismissal by producing satisfactory evidence and proving misconduct, when the dispute arising out of the order of dismissal is referred for Industrial adjudication.[6]

When the order of the management directing the workmen to retire on attaining the age of 59 years, was challenged as illegal, the Tribunal had necessarily to consider what is proper retirement age for the concerned workman. It is only when a finding is given that the concerned workman is entitled to continue beyond 58 years that the Tribunal can hold the order of the company directing his retirement at 58 years illegal.[7]

The termination of an employee's service must be preceded by a proper domestic inquiry held in accordance with the rules of natural justice.[8] In *D.C. & Gen. Mills* v. *Thejvir*,[9] a workman was terminated from his service after second inquiry and the second inquiry was held in spite of protest of the workmen. The request by the workman to management at the time of second inquiry to summon at his expense the witnesses whom he had produced in the first inquiry which was abandoned, was rejected. It was held that there was denial of reasonable opportunity to defend and the second inquiry was vitiated by violation of the principles of natural justice. If no reasonable opportunity was provided to a delinquent to place his defence, the inquiry cannot be said to be proper and in accordance with the rules of natural justice. Where a workman is served with hardly 24 hours notice before conducting enquiry against him and he is refused a reasonable time required for preparation of his defence and for effective cross-examination the resulting enquiry suffers from gross violation of the principles of natural justice. It has been further observed in the same case that if the management defends its action solely on the basis that the domestic inquiry held by it is proper and valid and if the Tribunal holds against the management on that point, the management will fail. On the other hand, if the management relies not only on the validity of the domestic inquiry, but also adduces evidence before the Tribunal justifying its action, it is open to the Tribunal to accept the evidence adduced by the management and hold in its favour even if its finding is against the management regarding the validity of the

1. *Rustom & Hornsby (I) Ltd.* v. *T.B. Kadam*, AIR 1975 SC 2025 ; *Jay Eng. Works* v. *Industrial Tribunal*, AIR 1971 AP 18.
2. *Fort William Jute Mills Co.* v. *First Labour Court*, (1963) 1 LLJ 374.
3. *Hindustan Lever* v. *Workmen*, AIR 1974 SC 17.
4. *L.H. Sugar Factories and Oil Mills (Private) Ltd. Pilibhit* v. *State of U.P.*, (1971) 1 LLJ 686.
5. *Ibid.*
6. *Lakshmirattan Cotton Mills* v. *Workmen*, AIR 1975 SC 1689.
7. *Dunlop India Ltd.* v. *Workmen*, AIR 1972 SC 2326.
8. *State Bank of India* v. *R.K. Jain*, AIR 1972 SC 136.
9. *D.C. & Gen. Mills* v. *Thejvir*, AIR 1970 SC 2128.

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domestic inquiry. Where an employer seeks permission of the Industrial Tribunal to adduce additional evidence on the ground that the domestic enquiry was held defectively the Tribunal cannot refuse the same on the ground that there is a possibility of the management coaching up its witnesses.

The Tribunal could not merely on ground of maintaining industrial peace and harmonious relations with the management and workers, compel the management to compensate loss by taking work from workmen on holiday when the strike was illegal.[1] An Industrial Tribunal would not be justified in holding that merely because there had been augmentation in the production, labour would be entitled to make a claim to bonus because of such increase.[2] Labour undoubtedly may be entitled to revision of wage scales, dearness allowance and other terms and conditions of service as also profit bonus ; but in the absence of legislation or a scheme of incentive production. Industrial Tribunals would not be justified in laying down a scheme themselves.[3]

Where the order of termination is couched in terms of an order of termination simpliciter, a Labour Court to which an industrial dispute is referred for adjudication is entitled to go behind the apparent language of the order in question and consider whether the order is termination simpliciter or imposed by way of punishment.[4]

In *Precision Bearings India* v. *Baroda Mazdoor Sabha*,[5] the Tribunal awarded dearness allowance to wage earners of higher income brackets in addition to the item of allowance which was referred to it. The item considered by the Tribunal was deliberately omitted in reference. Therefore, that part of award which related to items not referred was quashed because it would fall outside Tribunal's jurisdiction.

Modification of pleadings.—The Labour Courts and Tribunals can allow parties when they are not actuated by any oblique motive to modify their pleading to observe the interests of justice.[6]

Discharge or dismissal of a workman.—If the Tribunal is satisfied that the order of discharge is punitive or *mala fide* or is made to victimize the workman or amount to unfair labour practice, it is competent to set aside.[7] When a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court shall first decide the preliminary issue whether the domestic inquiry was defective ; it will then be for the management to decide whether it will adduce any evidence before the court. If the management chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue.[8]

Limitation on power to make award.—The Court and Tribunal are to function within the limit imposed by the statute. The powers are exercised not in arbitrary or in absolute fashion. The Labour Tribunals should confine themselves to pleadings and issues and to ascertain the real disputes between the parties to narrow the area of conflict and to see where the two sides differed.[9] Where an award in respect of an industrial dispute, has been given by a competent Tribunal, adjudicating on the dispute between the parties, the principle of *res judicata* as provided in Section 11 of the Civil Procedure Code does not apply, but it can definitely be said that reagitation of the same point is not in the interest of the industry and because the question has already been

1. *Jay Eng. Works* v. *Industrial Tribunal*, AIR 1971 AP 18.
2. *S.V.P. Cement Co.* v. *Workmen*, AIR 1972 SC 2148.
3. *Ibid.*
4. *Bihar State Road Transport Corporation* v. *State of Bihar*, AIR 1970 SC 1217.
5. AIR 1978 SC 419.
6. *Borpukhuice Tea Estate* v. *Industrial Tribunal, Assam*, AIR 1978 SC 992.
7. *G.M.D. & Corpn.* v. *P.H. Brohmbhatt*, AIR 1974 SC 136.
8. *Cooper Engineering Ltd.* v. *P.P. Mundhe*, AIR 1976 SC 1900.
9. *Walford Transport Ltd.* v. *First Industrial Tribunal West Bengal*, (1961) 2 LLJ 25.

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adjudicated upon there is no *bona fide* dispute for adjudication.[1]

Power of the High Court to interfere with award.—In *Workmen G.S.W.F. Mysore* v. *Ind. Tribunal*,[2] the award given by the Tribunal on the basis of settlement arrived at between the management and one of the two rival groups of office-bearers of a registered trade union representing the workmen was challenged under Article 226 before the High Court. The office-bearers of the rival group though present when the settlement was filed and evidence was recorded took no part in the proceedings before the Tribunal. It was held on the particular facts and circumstances of the case that the High Court was justified in refusing to interfere with the award, particularly in view of the fact that the award was beneficial to a substantial body of workmen of the factory. In *Workmen of Dodsal Pvt. Ltd.* v. *Dodsal Pvt. Ltd.*,[3] the Industrial Tribunal had made an award in 1971 introducing revised wage scales. There was some dispute regarding the interpretation of the terms of the award which was referred to the Tribunal. The Tribunal gave its own interpretation of its earlier award. On appeal the High Court gave its own interpretation different from that of the Tribunal, it was held by the Supreme Court that the "interpretation of the earlier award being with the competence of the Industrial Tribunal it would not be proper for the High Court to seek to displace that interpretation merely because another interpretation was also possible".

Power of Tribunal to grant interim relief.—Where the reference, concerning several matters such as fixation of wage scales, classification, etc., was pending for a long time, the Tribunal has power to grant interim relief to workmen without prejudice to the right of the parties to have their full say at the time of passing of final award.[4]

Section 16. Form of report and award.—Section 16 deals with the form of report or award. The Board or Court may consist of more than one persons. Therefore, the report of a Board or Court must be signed by all the members. The award of the Labour Court, Industrial Tribunal and National Tribunal should be signed by Presiding Officer. Proviso to Section 16(1) says that any member of the Board or Court may record any minute of dissent from a report or from any recommendation made therein. Even a dissenting member must put this signature over the report. Unless every member signs over the report, it shall not be valid. The report of a Board of Conciliation or Court of Inquiry, or the award of any Labour Court, Industrial Tribunal or National Tribunal shall be in a writing.

Section 17. Publication of report and award.—Every report of a Board or Court together with any minute of dissent recorded therewith as provided by Section 16 shall be published within a period of thirty days from the date of its receipt by the Appropriate Government. Every arbitration award, and every award of a Labour Court, Industrial Tribunal and National Tribunal shall also be published within thirty days from the date of receipt by the Appropriate Government. The publication of the report or the award shall be in such manner as the Appropriate Government thinks fit. An award published in the prescribed manner shall be final and shall not be called in question by any Court in any manner whatsoever. Section 17 is couched in mandatory form making it obligatory on the Appropriate Government to publish the award within thirty days.

It is open to Government in special circumstances not to publish an award under Section 17(1). Where settlement between the parties has been arrived at after the award has been sent by the Tribunal to the Government but before its publication, this situation is of exceptional nature and may lead to a conflict between a settlement under Section 18(1) and Section 18(3). In such a situation the only way to reconcile the two provisions

1. *River Steam Navigation Co. Ltd.* v. *Presiding Officer, Labour Court*, AIR 1963 Assam 86.
2. AIR 1973 SC 1423.
3. AIR 1979 SC 1072.
4. *Hind Cycles* v. *Workmen*, AIR 1974 SC 588.

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is to withhold the publication of the award as a binding settlement has already come into force, in order to avoid possible conflict.[1] An award under this section may be set aside if the management is denied an opportunity to adduce evidence before the Tribunal.[2]

In *S.M. Mujeeb* v. *Labour Court Anantapur and another*,[3] the dispute was heard by one officer but the award was signed by the successor presiding officer of the Tribunal. It was held that the award is illegal and vitiated. This is a material irregularity. An award can be pronounced by the Labour Court on the same day without waiting till the date of its publication in the Gazette.

Section 17-A. Commencement of award.—Section 17-A provides that an award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under Section 17. Proviso to sub-section (1) deals with situations where enforcement of an award may be stopped. The award shall not become enforceable on the expiry of thirty days :

(a) if the Appropriate Government is of opinion, in any case where the award has been given by a Labour Court or Tribunal in relation to an industrial dispute to which it is a party that it will be inexpedient to give effect to the whole or any part of the award on public grounds affecting :
   (i) national economy, or
   (ii) social justice ;

(b) if the Central Government, in any case where award has been given by a National Tribunal, on similar grounds is of the opinion that it would be inexpedient to give effect to the whole or part of the award.

For the purpose of stopping the enforcement of any award a notification in the official Gazette is necessary. Where a declaration stopping the enforcement aforesaid has been made the Appropriate Government or the Central Government may make an order rejecting or modifying the award. Any such award may be modified or rejected within ninety days from the date of publication of the award under Section 17. If the order as stated above has been made by the State Government, the award together with a copy of order shall be laid before the Legislature of that State, and if the order has been made by the Central Government the award shall likewise with a copy of order be laid before the Parliament.

Section 17-A(3) lays down that where any award as rejected or modified is laid before the Legislature of a State or Parliament such award shall become enforceable on the expiry of fifteen days from the date it is so laid. Where no modification or rejection order as aforesaid is made in pursuance of declaration made by the Government restraining the enforcement of the award, it shall become enforceable on the expiry of the period of ninety days from the date of publication of the award under Section 17 of the Act.

Sub-section (4) provides that the award shall come into operation with effect from such date as may be specified in the award. Where no date is specified in the award, it shall come into operation on the date when the award becomes enforceable. But the operation of the award is expressly made subject to the provisions of sub-sections (1) and (3) regarding enforceability of an award. If no date is specified as to when an award shall come into operation, it shall operate and be enforceable thirty days after its publication.

Enforceability of award.—Sub-section (1) provides as to when an award shall

1. *The Sir Silk, Ltd.* v. *The Government of Andhra Pradesh*, AIR 1964 SC 160.
2. *T.I. Textiles* v. *Workmen*, AIR 1972 SC 1933.
3. (1990) 2 Lab LJ 535 (AP).

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become enforceable and sub-section (4) provides as to when it shall come into operation. The difference between these two expressions is that when an award comes into operation rights under it becomes due or accrue in favour of one party against another, but these rights are not enforceable. It is not necessary that the moment an award comes into operation, rights under it may be enforceable. The right of enforcement of an award implies right of implementation of the award at the instance of a party in whose favour it is made against the party against whom it is made. Thus the rights accrue in the respective parties on the date of the operation of the award but can be enforced only after the date of its enforcement.

The award of a Tribunal is given effect to within thirty days of its publication, that is by the time it becomes enforceable. Under Section 17-A(4) the Industrial Tribunal may specify the date from which an award should come into force. The power to fix the date from which the award would become effective is discretionary and the award may not necessarily be made effective from the date of reference.[1] In cases where the Industrial Tribunal thinks that it is fair and just that its award should come into force from the date prior to the date of reference, it is authorised to issue such a direction, and when such a direction is issued, the award takes effect retrospectively.[2]

The Tribunal has discretion to give retrospective effect to an award. If the Tribunal has exercised its discretion and no substantial ground is made out to show that it was unreasonably exercised, the mere fact that it has retrospectively enforced its award from the date of the demand is hardly a ground for interference with the award.[3]

Publication of award.—The provision that the award shall be published within thirty days from its receipt by the Government is mandatory in the sense that it must be published. The award cannot be null and void if it was published more than 30 days after it was received by the Government. Publication of the award at a later date will only enhance the period from which it would become enforceable but would not affect the award on its merits.[4]

In *Agra Tin Manufacturing Co.* v. *Authority*,[5] an award was made directing reinstatement with continuity of services and payment of half wages for the period the workmen had remained unemployed. An appeal was made by the employer. By an interim order the implementation of the award was stayed but later on the appeal was dismissed directing payment of full wages from the due date of implementation of such award upto the date of actual reinstatement. Such an order was held to be correct because an order in appeal from such award cannot affect or postpone accrual of rights on the date of such award. In such cases it is reasonable to confine the period for compensation to that which the Conciliation Board passing the award had actually considered. The rights during the further period in which the workmen remain unemployed because the employer appeals against the award and obtains an interim stay can only be dealt with by the Appellate Tribunal. It cannot be said that the workmen remained unemployed till the actual date of reinstatement and the stay order only postponed the date on which the award was to become effective, and, therefore, the workmen were entitled only to half wages between those dates.

Section 17-B. Payment of full wages of workman pending proceedings in higher Courts.—While in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer

1. *Workmen, Calcutta D.L. Board* v. *Empoyers*, AIR 1973 SC 2251.
2. *Management of Wenger and Co.* v. *Their Workmen*, AIR 1964 SC 864.
3. *Hydro Engineers (Private) Ltd.* v. *Workmen*, AIR 1969 SC 182.
4. *Lord Krishna Sugar Mills Ltd. Saharanpur* v. *The State of U.P.*, (1960) 1 FJR 461 (All).
5. (1970) Lab IC 918 (All).

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shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been held to that effect in such court :

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.

Section 17-B was brought into force on 21st August, 1984. This section does not confer a new jurisdiction but it is codification in statutory form of a right available to workmen to get back wages when certain given conditions are satisfied. Before Section 17-B was introduced there was no bar for courts for awarding wages. Of course, the workmen had no right to claim it. This section recognizes such right. It was held in *Bharat Singh* v. *Management of New Delhi Tuberculosis Centre, New Delhi and others*,[1] that to construe Section 17-B in the manner detrimental to workmen would be to defeat its object and therefore this section applies to awards passed prior to the coming into force of this section if they have not become final. This section does not say that it would bind awards passed before the date when it came into force. This section was intended to benefit the workmen in certain cases. It would be doing injustice to the section to say it would not apply to awards passed just a day or two before the section came into force.

It was held in *W.H. D'Cruz and Sons* v. *M.E. Thomas and Another*[2] that Section 17-B of Industrial Disputes Act enacts statutory form of separate and independent right available to a workman during the pendency of the proceedings. Such right is an independent right which comes into existence after the award. Section 17-B is a statutory exception to the principle that no party has or gets any vested right in the life of litigation and creates liability in favour of the workman and against the employer.

In *M/s. Hind Plastic Industries, Bangalore* v. *Labour Court, Bangalore*,[3] it was held that the proviso to Section 17-B becomes operative if the employer satisfies the court that the workman had been employed and had been receiving adequate remuneration during the period he was dismissed and till the award was made in his favour. The court on being satisfied by the employer, must direct that wages shall not be paid by the employer to the workman for the period. In all other cases the payment of full wages at the rate of last drawn must follow on the affidavit of the workman. Once the workman files an affidavit, the burden of proof cast on him is discharged and the burden of proof shifts to the employer to prove that the workman was employed during the pendency of the proceedings.

In *Management, Hindustan Machine Tools Ltd.* v. *Judge, Labour Court and another*,[4] the petitioner company has filed a writ petition before the High Court against award of the Labour Court directing reinstatement. During the pendency of the proceedings in the High Court the workman was running a tea shop and therefore his claim for wages was contested by the employer on the ground that by virtue of proviso to Section 17-B, the workman was disentitled to claim any benefit under Section 17-B. It was held that in order to fall within the proviso to Section 17-B the workman should be employed from which he receives adequate remuneration and mere carrying on activity to make both ends meet will not disentitle him to get benefit under Section

1. (1986) 2 Lab LJ 217 (SC).
2. (1996) 1 LLJ 706 (Kerala).
3. (1990) Lab IC 236 (Karna).
4. (1992) 1 Lab LJ 494 (Raj).

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17-B. Running a tea shop will not amount to being employed.

It was held in *Carona Sahu Co. Ltd.* v. *Abdul Karim Munafkhan and others*,[1] that the expression full wages last drawn means the full wages which the workman was entitled to draw pursuant to the award. The component of wages payable on the date of award must alone be taken into consideration for determining what was wages payable to the workman on the date of award.

It was held in *Dena Bank* v. *Kiritikumar T. Patel*,[2] that the expression "full wages last drawn" in Section 17-B cannot be given extended meaning so as to mean wages which the workman would have drawn on date of award of reinstatement.

Section 18. Persons on whom settlements and awards are binding.—Section 18 of the Act enumerates persons on whom settlements and awards are binding. For this purpose settlements are classified in two categories, namely—

(i) settlement arrived at otherwise than in the course of conciliation proceedings, *i.e.*, without the aid of statutory agency, and

(ii) settlement arrived at in the course of conciliation proceedings, *i.e.*, with the aid of statutory agency.

In the former case a settlement under Section 18(1) arrived at by agreement between the employer and workmen otherwise than in the course of conciliation proceedings shall be binding on the parties to the agreement. But any such settlement in order to be binding must be signed by the parties thereto in the manner prescribed by rule and a copy of it must also be sent to the Appropriate Government.

Section 18(2) which is made subject to the provisions of Section 18(3) provides that an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to the arbitration.

Sub-section (3) provides that—

(i) a settlement arrived at in the course of conciliation proceedings under this Act ; or

(ii) an arbitration award in a case where a notification has been issued under sub-section (3-A) of Section 10-A ; or

(iii) an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on :

(a) all parties to the industrial dispute,

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, Arbitrator, Labour Court, Tribunal or National Tribunal as the case may be, record the opinion that they were so summoned without proper cause,

(c) where a party referred to is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates,

(d) where a party referred to in Clause (a) or Clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part thereof.

Persons bound by settlement.—Under Section 18(1) a settlement arrived at by agreement between the employer and the workman otherwise than in the course of conciliation proceedings is binding only on the parties to the agreement. A settlement arrived at in the course of a conciliation proceeding is binding not only on the parties to the industrial dispute but also on other persons specified in clauses (b), (c) and (d) of sub-section (3) of Section 18 of the Act.[3] Even if settlement regarding certain demands is arrived at otherwise than during the conciliation proceeding between the

1. (1995) 1 LLJ 47 (Bom).
2. AIR 1998 SC 511.
3. *Tata Chemicals* v. *Workmen, Tata Chemicals*, AIR 1978 SC 828.

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employer and the union representing majority of workmen, the same is not binding on the other union which represents minority workmen and which was not a party to that settlement. The other union can, therefore, raise the dispute in respect of the demand covered by the settlement and the same can be validly referred for adjudication.[1] In the above situation the settlement will not operate as estoppel against minority union raising same demands even though the benefits flowing from the settlement are accepted by workmen who were not signatories to it.[2]

The possibility of an adverse decision by court operates as a positive force in favour of deliberate and careful effort by both parties to settle their dispute through direct negotiation.[3] Where the workmen are represented by a recognised union, the settlement may be arrived at between the employer and the union. If there is a recognized union of the workmen and the constitution of the union provides that any of its office-bearers can enter into settlement with the Management on behalf of the union and its members, a settlement may be arrived at between the employer and such officer-bearer. But where the constitution does not so provide specially the office-bearer who wishes to enter into a settlement with the employer should have the necessary authorisation by executive committee of the union or by the workmen.[4] In *Herbertsons Ltd. case*[5] the Supreme Court has held that when recognized union negotiatiates with an employer the workers as individuals do not come into the picture. It is not necessary that each individual worker should know the implications of the settlement since a recognized union, which is expected to protect the legitimate interests of labour, enters into a settlement in the best interest of labour. This would be the normal rule, there may be exceptional cases where there may be allegations of *mala fides*, fraud or even corruption of other inducements. But in the absence of such allegation a settlement in the course of collective bargaining is entitled to due weight and consideration. However, there had been some difference of opinion between Mysore and Kerala High Courts about the binding effect of an award. The former holding that it will be binding upon all workmen[6] and the latter holding that it must be confined to those on whose behalf the dispute was raised.[7] But the Supreme Court in *Dunlop India Ltd.* v. *Workmen*,[8] has held that where the employer enters into an agreement with one of the labour unions which represents only one section of the employees such an agreement will bind only such of the employees as are members of the labour union which is a party to the agreement. The law in this regard has been clearly laid down by the Supreme Court in *Herberstons Ltd.* case discussed above. One thing should be kept in mind that the settlement has to be accepted or rejected as a whole. It is not possible to accept a settlement in pieces. Unless it can be demonstrated that the objectionable portion is such that it completely outweighs all the other advantages gained, the court will be slow to hold a settlement as unfair.[9]

In *The General Manager, Security Paper Mill, Hoshangabad* v. *R. Sharma and others*,[10] a settlement was reached in the course of conciliation proceeding between the Management and Security Paper Mill employees' union. The settlement provided for

1. *Tata Chemicals* v. *Workmen, Tata Chemicals*, AIR 1978 SC 828.
2. *Ibid.*
3. *New Standard Engg. Co.* v. *N.L. Abhyanker*, AIR 1978 SC 982.
4. *Hindustan Housing Factory Ltd.* v. *Hindustan Housing Factory Employees' Union*, (1959) Lab IC 1450 (Delhi).
5. *Herbertsons Ltd.* v. *Workmen*, AIR 1977 SC 322.
6. *B.M.M. Naidu* v. *Shantamma*, AIR 1901 Mys 22.
7. *Kerala State Electricity Board* v. *Sri Merchant*, ILR (1969) 1 Ker 28.
8. *Dunlop India Ltd.* v. *Workmen*, AIR 1972 SC 2326.
9. *Herbertson Ltd.* v. *Workmen*, AIR 1977 SC 322.
10. (1986) 1 Lab LJ 432 (SC).

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payment of incentive benefits to all workmen and other non-operative officers and staff. When the said settlement was in force the Management entered into an agreement with S.P.M. Employees Union, one of the trade unions reducing the rate of incentive benefit to the non-operative employees. Non-operative staff who were not members of this union claimed the incentive benefits in terms of the agreement reached in the course of conciliation proceedings and challenged the validity of the subsequent agreement. This claim was resisted on the ground that the S.P.M. employees' union was representative union and subsequent settlement was binding on all the workers. It was held that the Industrial Disputes Act makes a distinction between a settlement arrived at between the employer and the workmen in the course of conciliation proceeding and a settlement arrived at otherwise than in conciliation proceeding. The distinction is both as regards the procedure to be followed in the two cases and as regards the persons on whom they are binding. This distinction is clearly indicated in Section 18(1) and Section 18(3) of the Act. In view of Section 18(1) a settlement is not binding on those who were not a party to it. Therefore the employees in this case are entitled to claim incentive benefit in terms of the earlier settlement reached in the course of the conciliation proceeding.

The Management and the union cannot, when dispute is referred to the Conciliation Officer, claim absolute freedom of contract to arrive at a settlement in all respects binding on all workmen. Section 18(1) does not vest in the management and the union unfettered freedom to settle the dispute as they please and clothe it with a binding effect on all workmen or even on all members workmen of the union.[1] The settlement has to be in compliance with statutory provision. In *M.M. Pathak* v. *Union of India*,[2] a settlement was arrived at between the Life Insurance Corporation and its employees for payment of annual cash bonus. The settlement was approved by the Central Government. It was held that after granting approval the Central Government was not competent to issue another contrary direction which would have the effect of compelling the Life Insurance Corporation to commit a breach of its obligation under Section 18(1) of the Act. The above settlement was declared by the High Court as enforceable. The Supreme Court held that Parliament could not pass an Act invalidating the settlement by simply excluding specific settlement between the Corporation and its employees from the purview of Section 18 of the Act. Such selective exclusion could also offend Article 14.

A settlement arrived at between employer and workmen who is principally related to the question of bonus will not be binding on the workers if the settlement was not reached in the course of conciliation proceeding.[3]

In *Naresh Kumar Bansal* v. *G.S. Kalra and another*,[4] a dispute relating to termination of Cashier-cum-Godown keeper was referred for adjudication. The claim of the workman was rejected by the tribunal on the ground of settlement between union and management under Section 18(1). It was held that since the workman was neither a member of the union nor he had authorised the union to represent his case nor was a party to the settlement, therefore, the settlement was not binding on him.

In order that a settlement between the employer and the workmen may be binding on them, it has to be arrived at by agreement between the workmen and the employer. Where the workmen are represented by a recognized union, the settlement may be arrived at between the employer and the union. If there is a recognized union and the constitution of the union provides that any of its office-bearers can enter into a settlement with the management, a settlement may be arrived at between the employer

1. *Workmen of D.C.G. Mills Ltd.* v. *Management of D.C.G. Mills*, AIR 1970 SC 1851.
2. AIR 1978 SC 803.
3. *Workmen, S.E.S. Works* v. *State of W.B.*, AIR 1972 SC 1895.
4. (1993) 2 Lab LJ 377 (Delhi).

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and such office-bearer or office-bearers. But where the constitution does not so provide specifically, the office-bearers should have the necessary authorisation by the executive committee of the union or by the workmen.[1]

Fairness of settlement.—The question of justness, and fairness of settlement should be examined with reference to the situation as it stood on the date on which it was arrived at. In *New Standards Engg. Co.* v. *N.L. Abhyankar*[2] out of 1928 workmen who were in the service of the company on July 31, 1973, only 995 workmen signed the settlement and also accepted their dues thereunder, and 242 workmen accepted their dues under the settlement by actually singing the receipt though they had not signed the settlement. Further 910 workmen who left the company between January 1, 1968 and July 31, 1973 had also accepted their dues under the settlement. The settlement was made with the union which represented a very large majority of the workmen of the company. The Tribunal found the settlement as just and fair. The Supreme Court held the tribunal's finding as correct.

Power of the Tribunal to add other necessary and proper parties.—The effect of Section 18(3)(b), 11(3) and 10(1) is that if the Industrial Tribunal while dealing with an industrial dispute, is of the opinion that persons other than those mentioned as parties to the dispute, were necessary for valid determination of the dispute, it had an implicit power to summon them and if they were summoned to appear in the proceedings the award would be binding on them.[3] The Tribunal should also record its opinion as to whether these persons were summoned without proper cause.

Where certain points of dispute are referred to the Tribunal for adjudication, it may while dealing with points in reference deal with matter incidental to such dispute. It is while dealing with such incidental matters that the Tribunal may bring in certain persons not joined to the reference.[4] But this power cannot be exercised by the Tribunal so as to enlarge materially the scope of the reference itself, for the jurisdiction of the Tribunal to deal with an industrial dispute is derived solely from the order of reference passed by the Appropriate Government.

Therefore the Tribunals' power to add parties to the reference in exercise of its implied power under Section 18(3)(b) is subject to limitations. If it appears to the Tribunal that a party to the industrial dispute named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employees it may direct that persons should be joined who would be necessary to represent such interest.[5] In other words the test for proper exercise is : "would the non-joinder of the party make the arbitration proceedings ineffective and unenforceable".[6]

Liability of heirs and successors etc.—Section 18(3)(c) making heirs, successors and assigns of employer liable is important because in the absence of these provisions an employer could shirk from his liability either by pretending to transfer or actually transferring the industrial establishment to which the dispute relates. Section 18(3)(c) was considered by the Supreme Court in *Musaliar Industries (Private) Ltd.* v. *State of Kerala*.[7] A number of factories were run by a limited company. An employee of one of the factories was dismissed and the dispute was referred to a Tribunal. Later on the factories were closed due to financial difficulties. A new company was formed that took

1. *Brooke Bond India Ltd.* v. *Workmen*, (1981) 2 LLJ 184.
2. AIR 1978 SC 982.
3. *Hochtief Gammon* v. *Industrial Tribunal, Bhubaneshwar, Orissa*, AIR 1964 SC 1746.
4. *Ibid.*
5. *Ibid.*
6. *Ibid.*
7. (1960) 2 LLJ 341 (Kerala).

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fresh lease of the factories. Old workmen were employed on fresh agreements. It did not actually purchase the business run by the old company, but it had the advantage of loan arranged for the old company by the Government. The point at issue was whether new company was a successor of the old one. It was held that the interruptions of or gaps in doing business are not always decisive and the purchaser of a business may become its successor ; in the present case the same business was being carried on.

Where a dispute ends in a settlement in the course of a conciliation of the dispute raised by some members of the workmen belonging to a particular union, it will be binding on all the workmen of the establishment even if the other workmen belonging to the other union or unions were not parties to the agreement forming the basis of the settlement in the course of conciliation.[1] But where there are two identical disputes which are the subject-matter of conciliation before the same Conciliation Officer, the settlement reached in the course of conciliation between the management and some workmen or their union will not automatically bring to an end the conciliation pending with reference to the other but identical dispute before the same officer.[2] Any settlement in such situation will have to be arrived at not between the management and some only of such workmen ; but between the management and the entirety of the workmen who are parties to the dispute either by themselves or through their unions before the same officer so as to make the settlement come within the ambit of Section 18(3).[3] In extending the operation of settlement arrived at in the course of a conciliation proceeding beyond the parties thereto, Section 18(3) departs from the ordinary law of contract and gives effect to the principle of collective bargaining. But sub-section (3) cannot be invoked where the settlement is one not arrived at in the course of conciliation proceeding.[4]

In *Shri Bhagwan Dass Chopra* v. *United Bank of India*,[5] an employee of Narang Bank of India Ltd., was terminated from service. While the dispute regarding termination was pending before the Tribunal for adjudication the Narang Bank by an agreement with United Bank of India merged with the latter. After the merger United Bank of India was impleaded as a party in the matter pending before the Tribunal. The United Bank of India tried to arrive at a compromise with the employee by offering his reinstatement without back wages. On failure of this effort they filed an application to cross-examine the employee whose evidence was already closed prior to merger. It was held that all proceedings that had gone on till the date on which the United Bank of India was impleaded were binding on the United Bank of India. The proceedings before the Tribunal would, thereafter, be continued and the United Bank of India could take part in further proceedings in the same capacity in which Narang Bank of India was appearing in the case. The character of proceedings is not changed on account of merger and an assignee cannot set up a case inconsistent with the one put forward by his assignor except in exceptional cases where the assignee can raise a new plea. In the present case there are no exceptional circumstances warranting reopening of the proceedings. Hence the Tribunal was justified in rejecting the application of the United Bank of India for recalling the employee for further cross-examination.

Binding nature of award.—In *M.V. Kuriakose* v. *State of Kerala*,[6] one M and others were promoted in violation of award, and their promotion was challenged in a

1. *Workers of Buckingham and Carnatic Co.* v. *Commissioner of Labour and Chief Conciliation Officer*, AIR 1964 Mad 538.
2. *Management of Tiruchi Srirangam Transport Co. (P.) Ltd.* v. *Industrial Tribunal Madras*, AIR 1963 Mad 79.
3. *Ibid.*
4. *Jhagrakham Coalleries* v. *G.C. Agarwal*, AIR 1975 SC 171.
5. (1988) 1 Lab LJ 427 (SC).
6. AIR 1977 SC 1509.

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writ petition. M individually was not a party to proceedings but his union was a party. The order of promotion of all of them was quashed being in violation of the award. It was held that although M was individually not a party to the proceedings but he would be deemed to be duly represented by his union and the order of the High Court shall be binding on him.

Persons employed on the date of dispute and persons who subsequently become employed.—Clause (d) of Section 18(3) provides that when one of the parties to an industrial dispute is "workmen" all persons who were employed in the establishment or part of it will be bound by the settlement. The whole policy of Section 18 in view of the Supreme Court appears to be to give an extended operation to a settlement arrived at in the course of conciliation proceeding.[1] Therefore any settlement arrived at between the employer and one of the unions of the workmen, (where there were more than one such union) shall bind all the workmen of the establishment irrespective of the fact that they belonged to the Union that was a party to the dispute or not, provided the workmen are subsequently represented in the proceeding resulting in the settlement.

In order to bind a person by the term of an award it is not necessary that he should be employed on the date of making reference or the date of award, but on the date of dispute. Where a person was in the employment of the company on the date of dispute, but before announcement of the award was terminated, it was contended on behalf of the Company that he was not entitled to the benefits under the award. Rejecting this contention the High Court of Bombay observed that because the workman was in the employment of the company on the date on which the dispute arose, he becomes a part of it and the award is binding on him ; more so the date relevant under Section 18 is not the date of reference of award but the date of dispute.[2]

In *Avery India Ltd.* v. *IInd Ind. Tribunal W.B.*,[3] a very interesting problem arose : whether a workman who is retired on attaining the age of superannuation in accordance with the standing orders in force would be entitled to get the benefit of the increased age of retirement fixed by a subsequent award on the ground that it was binding on the parties under Section 18(3). This question has not been answered by the Supreme Court and is, therefore, still open for judicial verdict. However the workman was reinstated in this case not because he was entitled to the benefit of enhanced retirement age but because he was employed in the concern prior to the coming into force of the Standing Orders and therefore, the provisions of the Standing Order fixing the age of retirement at 55 were not applicable to him.[4]

Section 19. Period of operation of settlements and awards.—Section 19 of the Act deals with the period of operation of settlement and awards. Sub-sections (1) and (2) deal with commencement and period of operation of settlements arrived at in the course of proceedings before a Conciliation Officer or Board. Sub-section (3) to (7) deal with the period of operation of award.

For the purpose of operation settlement are classified in two categories namely :

(i) settlements in which the date of operation is fixed ; and

(ii) settlements in which no date of operation is fixed.

In the former case the settlement shall come into operation on the date agreed upon by the parties to the dispute. In the latter case, it shall come into operation on the date on which the memorandum of the settlement is signed by parties to the dispute.

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1. *Ramnagar Cane and Sugar Co. Ltd.* v. *Jatin Chakravarty and others*, (1961) 1 LLJ 244.
2. *Volkart Bros.* v. *T.V. Challappa and another*, (1954-55) 7 FJR 573 (Bom).
3. AIR 1972 SC 1626.
4. *G.K.N. Ltd.* v. *T.S. Sarvan*, AIR 1959 SC 1299.

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Sub-section (2) says that the settlement shall be binding for such period as is agreed upon by the parties. If no period is agreed upon it shall be binding for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute. The settlement shall continue to be binding after expiry of the entire period as aforesaid and until the expiry of further period of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.

Period of operation of awards.—Section 19(3) provides that an award shall remain in operation for a period of one year from the date on which the award becomes enforceable under Section 17-A provided that this period may be reduced by the appropriate Government, which may fix the period of operation as it thinks fit. The said period of one year may also be extended by the appropriate Government. Any such extension must be made before the expiry of the period of operation. Extension shall be for a period of one year at a time. But in no case the total period of operation of any award shall exceed three years from the date on which it came into operation.

Sub-section (4) provides for those circumstances where there has been a material change in the circumstances in which the award was made. Where the appropriate Government, whether of its own motion or on the application of any party bound by the award, considers that after the award was made, there has been material change in the circumstances on which the award was based, the appropriate Government may again refer the award, or part of it. If the previous award was made by a Labour Court a reference as aforesaid shall be made to Labour Court. If the previous award was made by an Industrial or National Tribunal, a fresh reference shall also be made to Tribunal. The reference shall be for decision whether the period of operation should be shortened because of the change in the circumstances. The decision of the Labour Court or the Tribunal on such reference shall be final.

Sub-section (5) provides that provisions of sub-section (3) dealing with the period of operation of an award shall not apply to any award which by its nature, terms or other circumstances does not impose, after it has been given effect to, any continuing obligation on the parties bound by the award.

Sub-section (6) lays down that the award, notwithstanding the expiry of the period of operation under sub-section (3), shall continue to be binding on the parties until a period of two months has elapsed from the date on which notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award. The overriding effect on the sub-section is that once an award is made, it shall continue to bind the parties so long as one of the parties does not decide, not to be bound by the award. In such a case the party deciding not to be bound shall give a notice to the party or parties of its intention to terminate the award and until after the expiry of two months from the date of notice, all the parties shall be bound by the award.

Sub-section (7) provides that no notice given under sub-section (2) or sub-section (6) shall have effect unless it is given by a party representing the majority of persons bound by the settlement or award, as the case may be.

Period of operation of settlements.—Latter part of Section 19(1) says that if no date is agreed upon between the parties, the settlement shall come into operation on the date on which the memorandum of the settlement is signed by the parties to the dispute. These provisions cannot be taken to mean that the award should necessarily be signed by the parties. The word "signed" has been used in the section only to indicate the time when the agreement is arrived at and from which it will bind them if no other date is

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agreed upon. It does not mean that the agreement shall only be valid if it is signed.[1] The intention to terminate a settlement whether it is by a formal notice in writing or it is to be spelt out from correspondence between the parties must be certain as to the date on which such termination is to take effect.[2]

In was held in *I.L.C. Manufacturers* v. *Workmen*,[3] that "where an agreement is for a fixed period it will not only continue to be binding for the duration of the period of settlement but thereafter also until it is terminated by a notice in writing and even then it will continue for a period of two months from the date of each notice. . . . It is no doubt true that the notice must be in writing but it can be inferred from correspondence between the parties and there cannot be any waiver by conduct or implication of the requirement of a written notice".

The award or settlement, under the Industrial Disputes Act replaces the earlier contract of service and is given plenary effect as between the parties. Earlier contract is not suspended but is superseded. Once the earlier contract is extinguished and fresh conditions of service are created by the award or the settlement, the inevitable consequence is that even though the period of operation and the span of binding force expires, on the notice to terminate the contract being given, the said contract continues to govern the relations between the parties until a new agreement by way of settlement or statutory contract by the force of an award takes place.[4]

In *Workmen, R.A.P. Project* v. *R.A.P. Project*,[5] as a result of settlement the motor vehicle drivers were to be paid overtime in accordance with the provision of the Motor Transport Workers Act, 1961. After about a year of this settlement, the Management of the Project gave notice to the Union under Section 19(2) conveying their intention to terminate the settlement in so far as the staff car drivers were concerned. By another notice the management said that staff car drivers would in future be entitled to overtime allowance as admissible to them under the Staff Car Rules. This gave rise to the dispute which was referred to the Tribunal. The Tribunal found the termination of the settlement in so far as it related to staff car drivers to be justified. The Supreme Court in appeal set aside the award of the Tribunal and held that at the time of settlement the parties were aware that the Act by its own force did not apply to the motor vehicle drivers and it could not be said that the Management entered into the settlement on a mistaken belief.

Section 19(2) does not entitle a party to a settlement to repudiate the settlement while the same is in operation. Giving advance notice within the ambit of law is not repudiation of the settlement.[6]

Period of operation of award.—An award shall remain in operation for a period of one year. The Appropriate Government may, under the provisos, reduce or extend the period of operation. This sub-section states for how long an award shall remain in force or continue to bind the parties. It does not provide a period of limitation for enforcement of an award.[7]

Review of operation of award.—An inquiry under Section 19(4) must be confined to the question whether since the award was made there has been a material change in the circumstances on which it was based and whether the change in

1. *Workmen of Ibrahimji Hassanbhai and Sons, Calcutta* v. *Ibrahimji Hassanbhai and Sons. Calcutta*, (1955-56) 9 FJR 197 (LAT).
2. *AIJ Mills Co.* v. *F.I. Tribunal*, AIR 1971 Cal 7.
3. AIR 1972 SC 343.
4. *L.I.C.* v. *D.J. Bahadur*, (1981) 1 LLJ 1 (SC).
5. AIR 1976 SC 441.
6. *Shukla Manseta Industries* v. *The Workmen*, AIR 1977 SC 2246.
7. *Kumar Swami Nagercoil Electric Supply Corporation* v. *South Travancore Electric Works Union and others*, (1958) 2 LLJ 72 (Kerala).

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circumstances justifies the period of operation to be shortened. Where an award had been given and the Government made another reference which resulted in second award it was held that so long as the first award stands operative its effect and binding nature cannot be avoided, and therefore, in second reference the whole field of enquiry cannot be opened up *de novo*.[1]

Res-judicata and Section 19(6).—The question how far the principle of *res judicata* shall be applicable in industrial disputes, was discussed by the Supreme Court in *Burn & Co. Ltd.* v. *Their Employees*.[2] In this case the Tribunal gave an award regarding scale of pay. The Trade Union on the expiry of one month from the date of publication of the above award, gave a notice of its intention to be not bound by the award. The industrial dispute in consequence of fresh demands was referred to another Tribunal. The second Tribunal held that the question of pay had already been adjudicated upon and as there is no change in the circumstances since the date of award the pay scale as fixed by the first Tribunal should stand. It was held by the Supreme Court that, it is contrary to well established principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full inquiry should be permitted to be re-agitated. Though Section 11 of the Civil Procedure Code is in terms not applicable to the present matter, the principle contained in it is based on sound public policy and is of universal application. The Supreme Court further observed that if it were to hold that an adjudication loses, its force when it is repudiated under Section 19(6), and that the whole controversy is at large, the result would be that far from reconciling themselves to the award and setting down to work it, either party will treat it as a mere stage in the prosecution of a prolonged struggle and far from bringing about industrial peace, the awards would turn out to be but truces, giving the parties breathing time before resuming hostile action with renewed vigour.[3]

The principle of *res-judicata* does not apply in certain circumstances. In a case there was a demand for increase in dearness allowance, the dispute was decided in 1949 and another dispute was decided in 1954. The Supreme Court observed that Section 19(6) contemplates that the award cannot be binding after its termination..... the principle of *res-judicata* should be applied with caution in case of industrial dispute relating to wages or dearness allowance. If there is a change in the circumstances, there can be change in the award.[4]

In another case it was held that the principle of *res-judicata* is based upon the doctrine of competence of the court whose decision is put as a bar. Therefore if the Tribunal has no jurisdiction to decide a dispute, a previous award of the Tribunal deciding that issue could not be held to be *res-judicata* barring the constitutional remedy by the High Court.[5]

There is difference between the award of a Tribunal and a decree or order of a Civil Court. The award is not perpetual and conclusive like that of the decree or order of the Civil Court. The award is effective for a limited duration. The doctrine of *res-judicata* is based on finality of decision but an award is not final for all times as is evident from Section 19 itself. An award remains operative for the period specified in the section and therefore the scope of the principle of *res-judicata* is limited to the period of currency of the award under that section and not beyond that time else the award will be extended by the application of *res-judicata* to a period longer than the

1. *India Industrial Works Ltd., Howrah* v. *Engineer Mazdoor Sabha*, (1955) 2 LLJ 675 (LAT).
2. AIR 1957 SC 38.
3. *Ibid.*
4. *Indian General Navigation and Railway Co. Ltd.* v. *Their Workmen*, AIR 1960 SC 1286.
5. *Dunderdale D.P. and others* v. *Mukherejee and others*, (1958) 2 LLJ 133 (Cal).

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statute permits.[1]

Termination of the award.—In *Shukla Manseta Industries* v. *The Workmen*[2] it was held that there is no legal bar to give advance intimation about the intention to terminate the settlement on the expiry of the period and to start negotiation for a more favourable settlement immediately thereafter. The only condition that has to be fulfilled by such a notice is that the period of two months from the date of notice must end on the expiry of the settlement and not before it. A settlement under Section 19(2) and an award under Section 19(6) cannot be given the same meaning. Even if an advance notice is given in the case of an award permitted by law and Government in exercise of its powers extends the award in a given case, such a notice would be infructuous and inoperative under the law. The extension of the award by the Government in exercise of a statutory power would prevail upon the action of the party to terminate the award by notice.[3] The intention to terminate the award with reference to a particular date must be established by the parties who set up a case of termination.[4] An industrial dispute may be raised by a group of workmen and if the dispute is referred to the Tribunal and an award is given, it binds according to Section 18 all persons who were employed in the establishment or who would be employed in future, irrespective of the fact that they were a party to the dispute. The expression "any party bound by the award" used in Section 19(6), in view of the Supreme Court, refers to and includes all persons bound by the award under Section 18.[5] Mere serving of a charter of demands by a trade union on employer does not by itself show that the union has terminated previous award. Neither the fact of workers going on strike subsequently nor the fact of employer's participation in conciliation proceeding is of any relevance.[6]

Section 20. Commencement and conclusion of proceedings.—Section 20 of the Act deals with the commencement and the conclusion of conciliation proceedings and proceedings before an arbitrator under Section 10-A or before a Labour Court, Industrial Tribunal or National Tribunal. For the purpose of convenience these proceedings may be classified in two heads :

(i) Proceedings before Conciliation Officer or Conciliation Board, and

(ii) Proceedings before Labour Court, Industrial Tribunal and National Tribunal.

Conciliation Proceedings.—Conciliation Proceedings under the first head shall be deemed to have commenced on the date on which a notice of strike or lock-out under Section 22 is received by the Conciliation Officer. A proceeding before a Board of Conciliation shall be deemed to have commenced on the date of the order referring the dispute to a Board.

Conclusion of Conciliation Proceedings.—Sub-section (2) of Section 20 provides that conciliation proceeding shall be deemed to have concluded :

(a) when the memorandum of settlement is signed by the parties to the dispute, in the case where a settlement is arrived at between the parties to the dispute ;

(b) where no settlement is arrived at when the report of the Conciliation Officer is received by the Appropriate Government or when the report of the Board is published under Section 17, as the case may be ; or

(c) when a reference is made to a Court, Labour Court, Tribunal or National Tribunal under Section 10 during the pendency of conciliation proceedings.

1. *Dunderdale D.P. and others* v. *Mukherejee and others*, (1958) 2 LLJ 133 (Cal).
2. AIR 1977 SC 2246.
3. *Shukla Manseta Industries* v. *The Workmen*, AIR 1977 SC 2246.
4. *Thungabhadra Industries* v. *Workmen*, AIR 1973 SC 2272.
5. *The Associated Cement Companies Ltd.* v. *Their Workmen*, AIR 1960 SC 777.
6. *Thungabhadra Industries* v. *Workmen*, AIR 1973 SC 2272.

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The expression "received by the appropriate Government" in Section 20(2)(b) implies the actual receipt of the report by the Government, and a receipt of the report by the Chief Labour Commissioner was not enough.[1]

Arbitration and adjudication proceedings.—Section 20(3) provides that proceedings before an arbitrator under Section 10-A, or before a Labour Court, Tribunal or National Tribunal shall be deemed to have commenced on the date of the reference of the dispute for arbitration or adjudication as the case may be. Such proceedings shall be deemed to have concluded on the date on which the award becomes enforceable under Section 17-A. In other words these proceedings shall conclude after the expiry of 30 days from the date on which award is published.

The date of reference for the purposes of Section 20(3), whether shall be the date on which the order to make a reference was passed or the date when the order was communicated to the authorities concerned. On a plain reading of Section 10 of the Industrial Disputes Act, it is clear that as soon as a reference is made by an order in writing, the reference is complete and the proceedings before a Tribunal shall be deemed to have commenced on that date as provided by Section 20(3) of the Act.[2]

Section 21. Certain matters to be kept confidential.—Section 21 of the Act provides that certain matters are to be kept confidential. Therefore these matters shall not be included in any report or award made under this Act.

Any information, obtained by a Conciliation Officer, Board, Court, Labour Court, Tribunal, National Tribunal or an arbitrator in the course of any investigation or inquiry, which relates to a Trade Union or to any individual business (whether carried on by a person, firm or company) which is not available otherwise than through the evidence given before any such authority, shall not be included in any report or award if the Trade Union, person, firm or company in question has made a request in writing to treat such information as confidential. It is further provided that any such authority as aforesaid or any person present at or concerned in the proceedings shall not disclose any such information without the consent in writing of the Secretary of the Trade Union, or the person, firm or company in question, as the case may be.

Proviso to Section 21 provides that the prohibition contained in the section as stated above shall not apply to a disclosure of any such information for purposes of prosecution under Section 193 of the Indian Penal Code, 1860.

Thus Section 21 provides that any Union, person, firm or company which gives evidence in any industrial dispute can make a request to the authority before which evidence is given that the said information shall be treated as confidential. The request must be in writing. Whenever any such request is made, neither the information shall be included in the report of the award nor disclosed in any other manner. The restriction under this section applies to an information given in the course of investigation or enquiry and which is not obtainable otherwise than through the evidence given before the authority concerned.

Section 21 of the Act merely prevents the authority concerned from including in its award the contents of any document claimed by a party to be confidential. It does not in any way prevent a party from inspecting any document produced in evidence by the opposite party because a party as a rule must have inspection of any document which its opponent wishes to use in evidence against him.[3]

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1. *Workers of Industry Colliery* v. *Industry Colliery*, AIR 1953 SC 88.
2. *The Associated Cement Cos. Ltd.* v. *Their Workmen*, (1953) 2 LLJ 1369.
3. *Kanpur Hosiery Workers' Union, Kanpur* v. *The Pukka Hosiery Mill Kanpur*, 1952 LAC 18.

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CHAPTER VII
STRIKES AND LOCK-OUTS

Strike is collective stoppage of work by workmen undertaken in order to bring pressure upon those who depend on the sale or use of the products of work. Ludwig Teller in his book, "Labour Disputes and Collective Bargaining" opines that "the word 'Strike' in its broad significance has reference to a dispute between an employer and his workers, in the course of which there is a concerted suspension of employment. Becuase it is an expensive weapon the strike is generally labour's last resort in connection with industrial controversies".

Lock-out is a weapon in the hands of the employer, similar to that of strike in the armoury of workmen used for compelling persons employed by him to accept his terms or conditions of or affecting employment. In lock-out an employer shuts down his place of business as a result of reprisal, or as an instrument of coercion or as a mode of exerting pressure upon the employees with a view to dictate his own terms to them.

Section 22. Prohibition of Strikes and lock-outs.—Section 22 of the Act deals with the prohibition of strikes and lock-outs. This section applies to the strikes or lock-outs in industries carrying on public utility service. Strike or lock-out in this section is not absolutely prohibited but certain requirements are to be fulfilled by the workmen before resorting to strike or by the employers before locking out the place of business. Conditions laid down in Section 22(1) are to be fulfilled in case of strike in any public utility service and conditions as laid down in Section 22(2) are to be fulfilled in case of any lock-out by the employer carrying on any public utility service. The intention of the legislature in laying down these conditions was to provide sufficient safeguards against a sudden strike or lock-out in public utility services lest it would result in great inconvenience not only to the other party to the dispute but to the general public and the society.

Section 22(1) provides that no person employed in public utility service shall go on strike in breach of contract :

(a) without giving to the employer notice of strike within six weeks before striking ; or

(b) within fourteen days of giving such notice ; or

(c) before the expiry of the date of strike specified in any such notice as aforesaid ; or

(d) during the pendency of any conciliation proceeding before a Conciliation Officer and seven days after the conclusion of such proceedings.

It is to be noted that these provisions do not prohibit the workmen from going on strike but require them to fulfil the conditions before going on strike. Further these provisions apply to a public utility service only and not to a non-public utility service.

Notice of strike within six weeks before striking is not necessary where there is already a lock-out in existence. Notice may be given by the Trade Union or representatives of the workmen elected to do so. A notice of strike shall not be effective after 6 weeks from the date it is given. So, the strike must be commenced within that period.

Section 22(2) lays down that no employer carrying on any public utility service shall lock-out any of his workmen—

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(a) without giving them notice of lock-out as hereinafter provided within six weeks before locking out ; or

(b) within fourteen days of giving such notice ; or

(c) before the expiry of the date of lock-out specified in any such notice as aforesaid ; or

(d) during the pendency of any conciliation proceeding before a Conciliation Officer and seven days after the conclusion of such proceedings.

Section 22(3) provides that the notice of strike or lock-out as provided by sub-sections (1) and (2) may in certain cases be dispensed with.

(1) No notice of strike shall be necessary where there is already in existence a lock-out in the public utility service concerned.

(2) No notice of lock-out shall be necessary where there is already in existence a strike in the public utility service concerned.

The employer shall send intimation of strike or lock-out on the day on which it is declared to the specified authority. The authority to whom the above intimation is required to be sent shall be specified by the Appropriate Government either generally or for a particular area or for a particular class of public utility services. Sub-section (3) is in the nature of an exception of sub-sections (1) and (2) of Section 22.

Section 22(4) says that the notice of strike shall be given by such number of persons to such person or persons in such manner as may be prescribed.

Section 22(5) provides that the notice of lock-out shall be given in such manner as may be prescribed.

Section 22(6) deals with the intimation of notices given under sub-section (1) or (2) to specified authorities. If on any day an employer receives from any person employed by him any such notice as is referred to in sub-section (1), he shall within five days report to the Appropriate Government or to such authority as that Government may prescribe, the number of such notices received on that day. Similarly, if an employer gives any notice as is referred to in sub-section (2) to any person employed by him, he shall report this fact within five days to the Appropriate Government or to such authority as the Government may prescribe.

Prohibition of Strike.—Where a strike has commenced during the pendency of conciliation proceedings, and the workmen, pleaded that the strike was provoked by the employer, it was held that the fact that the strike or lock-out was provoked by the opposite party will not absolve the person, going on strike or declaring lock-out of the duty of complying with the requirements of Sections 22 and 23 of the Act.[1]

The words 'no person' appearing in this sub-section refer to workmen because no one other than a workman is likely to go on strike in an industry. It must further be proved that the workmen were employed in an industry which was a public utility service within the meaning of Section 2(n).[2] A company was running three units, namely (i) Cotton Textile weaving unit, (ii) Silk unit, and (iii) Art silk products manufacturing unit. The Cotton Textile industry was declared a public utility service by the Appropriate Government. About 230 workmen, working in the silk unit went on strike. The company did not show that the concerned workmen, at the time of strike or prior to that, had ever worked in cotton weaving mill. There was no evidence to the effect that the workmen under their terms of employment were required to work in the cotton mill or silk mill as required. No work in the Cotton textile section was ever assigned to any of the concerned workmen. On the basis of the above evidence it could not be held that the concerned workmen were employed at the time of strike in 'public utility service' within

1. *Colliery Mazdoor Congress* v. *Beerbhum Coal Co.*, 1952 LAC 29 (LAT).
2. *Swadeshi Industries Ltd.* v. *Its Workmen*, (1960) 2 LLJ 78 (SC).

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the meaning of Section 2(n) and for the purpose of Section 22 of the Act.[1] It was for the employer company to prove by clear and cogent evidence that the workmen under their conditions of service could be asked to work in the cotton weaving mill when required.

The expression "in breach of the contract" means breach of contract of service of employment whether the contract is express or implied. There can be no contract not to go on strike, and even if such a contract exists it cannot form a part of the valid contract of service. Contract of employment implies to work according to the rules of the contract in which the workman is employed. Breach of contract does not mean breach of a condition of service.[2]

Breach of provisions of Section 22 or 23 of the Act attracts penal liability under Section 26 of the Act. Therefore, in order to hold a person liable two things must be proved by the prosecution :

(i) that the strike took place in a concern which is a public utility service within the meaning of Section 2(n) of the Act, and

(ii) that the strike was in breach of contract of service of the striking workmen.

In *Madura Coats Ltd.* v. *Inspector of Factories Madurai*,[3] the workmen went on strike without serving a notice under Section 22. They claimed wages for national holiday which fell in the strike period. The Supreme Court held that they were not entitled to wages because they have themselves brought about a situation by going on strike without giving a notice whereby the management was deprived of their right to take work from them.

Notice of Strike.—In *Mineral Miner's Union* v. *Kudremukh Iron Ore Co. Ltd.*,[4] it was held that the provisions of Section 22 are mandatory and the date on which the workmen proposed to go on strike should be specified in the notice. If meanwhile the date of strike specified in the notice of strike expires, workmen have to give a fresh notice and all other statutory consequences flowing out of the said notice would follow. It is not correct that the provisions of Section 20(1) and 12(1) of the Act are not applicable to second notice. Whenever a notice under Section 22 is issued, even though such a notice is necessitated by the failure of conciliation proceedings, provisions such as Section 20(1) and 12(1) read with Section 22 in its entirety will be attracted. It was further held that deduction of wages for days of illegal strike would be justified.

In *Life Insurance Corporation of India and others* v. *Amlendu Gupta and others*,[5] the permanent Class III, Class IV employees of Life Insurance Corporation went on strike after serving notice in accordance with the provisions of the Industrial Disputes Act when the Corporation did not pay bonus in spite of various orders of the Supreme Court of India. The Corporation issued a circular for proportionate deduction of wages and allowances for strike period. In this appeal this circular has been challenged. It was held that under the Industrial Disputes Act, the employees are entitled to go on strike in case of refusal or denial by the employer to give its workmen benefits and emoluments to which they are entitled under law or contract of service. But before going on strike certain formalities as prescribed by Section 22 of the Act, have to be observed. If the strike is in accordance with the provisions of the Act, the strike must be deemed legal. In such a situation the High Court is fully competent to decide whether strike was justified and direct payment of wages for strike period if strike is legal and justified.

1. *Swadeshi Industries Ltd.* v. *Its Workmen*, (1960) 2 LLJ 78 (SC)..
2. *State of Bihar* v. *Deodhar Jha*, AIR 1958 Pat 51.
3. (1981) 1 LLJ 255 (SC).
4. (1989) 1 Lab LJ 277 (Karn).
5. (1988) 2 Lab LJ 495 (Calcutta).

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In *ANZ Grindlays Bank* v. *S.N. Khatri and others*,[1] the Bombay High Court following the decision in *Syndicate Bank* v. *K. Umesh Naik*,[2] held that once the strike is held to be illegal, the question of justifiability does not arise and the employees in public utility services are not entitled to seek wages for the strike period unless they prove that the strike was legal and justified. In *Management of M/s. Baldev Soap Factory* v. *Delhi Administration and others*[3] the Delhi High Court held that in the present case the strike was resorted to after giving notice to the management and hence the workman cannot be terminated for participation in strike. The Labour Court has not held that the strike was illegal and unjustified. Therefore the claim of workmen for wages is not barred by the judgment of the Supreme Court in *Syndicate Bank* v. *K. Umesh Naik*,[4] and participation of workmen in strike cannot result in dismissal from service.

In *B.R. Singh* v. *Union of India*,[5] it was held that the strike is a form of demonstration. Though the right to strike or right to demonstrate is not a fundamental right, it is recognised as a mode of redress for resolving the grievances of the workers. Though this right has been recognised by almost all democratic countries but it is not an absolute right. Certain restrictions have been placed by Sections 10(3), 10-A (4-A), 22 and 23 of the Industrial Disputes Act on the right to strike.

Meaning of the terms "within six weeks before striking" and "within fourteen days of giving such notice".—Taking the two provisions together it means that a person employed in a public utility service may go on strike on giving to the employer a notice of strike provided :

(i) the strike takes place within 6 weeks of the giving of notice ; and

(ii) 14 days have expired after such notice.

Thus strike can take place only when 14 days have passed but before 6 weeks have expired after giving such notice. This minimum period of fourteen days after notice within which workmen are prohibited to go on strike is prescribed with a view to give some time to the employer to look into the charter of demands of the workmen and also to give time to the Labour Department of the Government to intervene so as to avoid strike by finding out some compromise formula. Neither the employee is restrained from going on strike nor the employer is restrained from locking out the industry but some minimum conditions before striking or locking out are required to be fulfilled, otherwise the stoppage of work in a public utility concern may result in inconvenience to the society. Therefore these safeguards were felt necessary to be provided by the Legislature.[6]

During the pendency of conciliation proceedings.—This expression is used in Section 22(1)(d), and Section 22(2)(d). A conciliation proceeding means a proceeding before a Conciliation Officer. Where a conciliation proceeding was pending and one of the Unions of the workmen was a party to it, it was held by the Supreme Court that the settlement according to Section 18(3) will bind not only those workmen who are members of this Union but to all workmen working in the establishment. Therefore, if the proceeding relates to a matter concerning all the employees its pendency would be a bar against all the employees.[7]

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1. (1995) 2 LLJ 877 (Bom).
2. (1994) 2 LLJ 836 (SC).
3. (1995) 2 LLJ 376 (Del).
4. (1994) 2 LLJ 836 (SC).
5. (1989) 2 Lab LJ 591 (SC).
6. *State of Bihar* v. *Deodhar Jha*, AIR 1958 Pat 51.
7. *Ram Nagar Cane and Sugar Co. Ltd.* v. *Jatin Chakravarty and others*, (1961) 1 LLJ 244 (SC).

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Prohibition of lock-out.—The prohibition contained in Section 22(2) against a lock-out by the employer is similar to that against strike by workmen. In case of a lock-out the prosecution has to establish that the lock-out is in a public utility service. Like sub-section (1) it need not be shown that the lock-out is in breach of contract for this expression is missing in sub-section (2). So far as lock-out during the pendency of a conciliation proceeding is concerned provisions relating to strike in this connection shall apply here also. A conciliation proceeding relating to a matter concerning all employees may bar a strike or a lock-out as the case may be, but if the proceeding is confined to a specific demand concerning a class of employees the other workmen who are not interested in the demand may not be bound by it.[1]

For lock-out a notice under Section 22(2) is necessary. Therefore, a lock-out without notice, except where, such a notice is expressly dispensed with is illegal under Section 24 of the Act.[2]

Section 23. General prohibition of strikes and lock-outs.—The prohibition against strikes and lock-outs contained in Section 23 is general in nature. It applies to both public utility as well as non-public utility establishments. A strike in breach of contract by workmen and lock-out by the employer is prohibited in the following cases :

(i) during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings ;

(ii) during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal, and two months after the conclusion of such proceedings ;

(iii) during the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings, where a notification has been issued under sub-section (3-A) of Section 10-A, or

(iv) during any period in which a settlement or award is in operation in respect of the matters covered by such settlement or award.

The object of these provisions seems to ensure a peaceful atmosphere to enable a conciliation or adjudication or arbitration proceeding to go on smoothly. This section because of its general nature of prohibition covers all strikes and lock-outs irrespective of the subject-matters of dispute pending before the authorities.[3] It is noteworthy that a conciliation proceeding before a Conciliation Officer is no bar to a strike or lock-out under this section. It is only a conciliation proceeding before a Board which is mentioned in this section. In a reference where neither the employers nor workmen were taking any part, the pendency of such reference would not attract Section 23 to the strike declared during the pendency of the reference.[4] While there is justification for preventing a strike when a dispute between the employer and the general body of workmen is pending adjudication, it would be too much to expect that the legislature intended that a lid should be put on all strikes just because the case of a single workman was pending. It is reasonable that the general body of labour should be prevented from resorting to strike where they had chosen to espouse the cause of a single workman.[5] There cannot be a strike or lock-out even in relation to matter other than those which are pending before a Labour Court.[6]

In breach of contract.—The Standing Orders relating to an establishment

1. *Ram Nagar Cane and Sugar Co. Ltd.* v. *Jatin Chakravarty and others*, (1961) 1 LLJ 244 (SC).
2. *Tata Iron and Steel Co.* v. *Workmen*, AIR 1972 SC 1917.
3. *State of Bihar* v. *Deodhar Jha*, AIR 1958 Pat 51.
4. *Ballarpur Collieries Co.* v. *Salim M. Merchant*, (1967) 2 LLJ 201 (Pat).
5. *Chemicals & Fibres of India* v. *D.C. Bhoir*, AIR 1975 SC 1660.
6. *Ibid.*

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approved by the statutory authority, govern the contractual relationship between the workmen and the employer. Therefore any strike in breach of the Standing Orders may well be a strike in breach of contract of service, but that by itself is not sufficient to make the strike illegal. For any strike to be illegal under Section 23 of the Act, merely breach of contract is not enough ; the other conditions enumerated in clauses (a), (b), (bb) or (c) are also required to be fulfilled.[1]

Employed in any industrial establishment.—Section 23 provides that no workman employed in any industrial establishment shall go on strike. The establishment to which this section applies must be an industry under Section 2(j) of the Act. The expression, 'industrial establishment' refers to the place of activity or place used for manufacture 'Industrial establishment' in Section 23 is used in the same sense in which it is used in Section 2(n)(ii) of the Act.

Sections 22 and 23 compared.—(i) Section 22 applies to public utility concerns only, Section 23 is applicable to both public utility as well as non-public utility concerns. (ii) Section 23 does not prohibit strike or lock-out during the pendency of conciliation proceeding before a Conciliation Officer, Section 22 does so. (iii) Under Section 22 notice of strike or lock-out is necessary, under Section 23 no such notice is required, (iv) Both Sections 22 and 23 are applicable to public utility service, but Section 23 applies to non-public utility services only. Section 22 is not applicable to non-public utility services. Therefore in case of strike or lock-out in a public utility service prohibitions contained in Section 22 as well as Section 23 apply. As no notice in case of a non-public utility service is necessary, a sudden strike is not prohibited under this Act in such concerns.

Matters covered by the Settlement.—Clause (c) of Section 23 is different in one important respect from the other clauses of the section. The words "in respect of any of the matter covered by the settlement or award" are inserted in clause (c). It means during the period in which a settlement or award is in operation a strike or lock-out in respect of any matters covered by the settlement or award is prohibited. Thus a strike or lock-out in respect of a matter not covered by the settlement or award during its operation is not prohibited. The other clauses of Section 23 enact absolute prohibition against strike or lock-out whether in respect of the matters pending for conciliation, adjudication or arbitration or not connected at all with any such matter. Sub-clause (c) makes a distinction between strike or lock-out in respect of a matter covered by settlement or award and those not covered by it.[2] In *Ballarpur Collieries Co.* v. *Salim M. Merchant*[3] the Regional Labour Commissioner used his good offices to arrive at some settlement. He did not act according to the provisions of the Act dealing with conciliation proceedings. The matter in dispute at the time of strike was not covered by the settlement and therefore Section 23(c) was held to have no application in the present case.

Mere breach of Standing Order could not render the strike illegal. In order to be hit by Section 23(c) the strike by workmen must be in breach of contract in respect of a matter covered by the settlement which is in operation at the time of the strike. The assurance given by workmen to the Labour Commissioner that they would not resort to strike and would adopt all constitutional means to get their grievances redressed neither amounted to contract nor a matter covered by the settlement and therefore the strike by workmen after such settlement would not attract Section 23(c) of the Act.[4]

In *Workmen of Motor Industries Co. Ltd.* v. *Management of Motor Industries Co.*

1. *Ballarpur Collieries Co.* v. *Salim M. Merchant*, (1967) 2 LLJ 201 (Pat).
2. *Probhat Kumar Kar* v. *William Trevelyan Curtis Paker*, AIR 1950 Cal 116.
3. (1967) 2 LLJ 201 (Pat.)
4. *Ballarpur Collieries* v. *C.G.T. Dhanbad*, AIR 1972 SC 1216.

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Ltd.,[1] one of the clauses of settlement arrived at between the management and association of workmen before the Conciliation Officer provided that neither the association nor the management would resort to any direct action such as strike or lock-out without giving to the other a four days' notice. In violation of this clause the workmen during the operation of the settlement went on strike on the question of suspension of one of the workers pending a domestic enquiry. It was held that the strike was in connection with a matter not covered by settlement. Therefore, the strike was not illegal under Section 24 read with Section 23(c). However the strike was held to be in contravention of the clause of settlement forbidding strike without notice. Because settlement was binding on workmen and was in operation at the time, the strike was illegal under Section 24 of the Act. In this case a distinction between strike envisaged by Section 23(c) and Section 24 was pointed out. Section 23(c) envisages a strike in respect of a matter covered by a settlement and Section 24 deals with a strike in breach of a settlement. A strike in breach of contract during the operation of a settlement and in respect of a matter covered by the settlement falls under Section 23(c) and is illegal under Section 24. Commencing a strike or action in furtherance of it, in breach of a settlement binding on the person who so commences it or acts in its furtherance is an offence punishable under Section 29.

Section 24. Illegal strikes and lock-outs.—According to Section 24(1) a strike or lock-out shall be illegal if it is :

(1) Commenced or declared in contravention of Section 22 in a public utility service ;

(2) Commenced in contravention of Section 23 in any industrial establishment (including both public utility and non-public utility service) ;

(3) Continued in contravention of an order made by the Appropriate Government under Section 10(3) or sub-section (4-A) of Section 10-A of the Act.

Sub-section (2) provides that where a strike or lock-out in pursuance of an industrial dispute has already commenced and is in existence at the time of reference of the dispute to a Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, the continuance of such strike or lock-out shall not be deemed to be illegal provided that such strike or lock-out was not at its commencement in contravention of the provisions of this Act or the continuance thereof was not prohibited under Section 10(3) or sub-section (4-A) of Section 10-A.

According to Section 24(3) a lock-out declared in consequence of an illegal strike or strike declared in consequence of an illegal lock-out shall not be deemed to be illegal.

Punishment for illegal strikes.—The workers have a right if not a fundamental right, to go on strike.[2] If a strike is illegal the party guilty of the illegality is liable to punishment under Section 26 of the Act. Even in case of illegal strikes a distinction has been attempted to be made between (i) illegal but justified strike ; and (ii) illegal and unjustified strike. How can strike, which is illegal be at the same time justified. It is said that a strike may be technically illegal because it is in contravention of the provision of this Act but because the causes that lead to a strike are often mixed question of legal and illegal demands, a strike may not be unjustified but the conduct of workmen may be objectionable, or their behaviour may be violent. On the other hand a strike may be illegal but it might have been taken recourse to for good reasons and carried on in an orderly and peaceful manner. It is for these reasons that even illegal

1. AIR 1969 SC 1280.
2. There is no fundamental right to strike in the Constitution of India : *Kameshwar Prasad* v. *State of Bihar*, 1962 SCR 369.

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strikes are classified as justified and unjustified by those who administer industrial law.

Crompton Greaves v. *The Workmen*[1] is a leading case on this point. In this case it was held that in order to entitle the workmen to wages for the period of strike, the strike should be legal as well as justified. A strike is legal if it does not violate any provision of the statute. A strike cannot be said to be unjustified unless the reasons for it are entirely perverse or unreasonable. The use of force or violence or acts of sabotage resorted to by the workmen during a strike disentitle them to wages for the strike period. Where, before the conclusion of the talks for conciliation which were going on through the instrumentality of Assistant Labour Commissioner, the company retrenched as many as 93 of its workmen without even intimating to the Labour Commissioner that it was carrying out its proposed plan of effecting retrenchment of the workmen, the strike cannot be said to be unjustifed.[2]

The effect of an illegal strike on the demand of the workmen to wages or compensation and their liability to punishment, according to one view is based on the strike being justified. Mere illegality of the strike does not end the matter. It means if the strike is illegal and at the same time unjustified, the workmen have no claim to wages and must also be punished, if it is justified, they have a right to claim wages. This view is based on a full bench decision of the Labour Appellate Tribunal in a reference on question "whether the employer can dismiss a workman for joining a strike which is not illegal but unjustified".[3] It was held in this case that the right to strike is recognised by implication. For various reasons a strike may be unjustified, for example—

(a) demands may be unreasonably high,
(b) demands may be made with extraneous motives,
(c) steps taken by employer to redress the alleged grievances through negotiation or conciliation.

The strike does not, by itself put an end to the employer-employee relationship, nor can an employer discharge a workman for mere participation in a strike which is not illegal, or in an illegal strike where there was no appropriate provision in the Standing Orders.[4]

In *Bank of India* v. *T.S. Kelewala*,[5] the Supreme Court held that where the contract or standing orders or the service rules/regulations are silent on the issue of workers' entitlement to wages during the strike period, the management has the power to deduct wages for absence from duty when the absence is a concerted action on the part of the employees and the absence is not disputed, irrespective of the fact whether the strike was legal or illegal.

The question is whether deduction of wages for the strike period can be made or not. In view of the decision of the Supreme Court in *India General Navigation and Railway Company Ltd., and another* v. *Their Workmen*,[6] if the strike was illegal, workmen are not entitled to wages or compensation and they are also liable to punishment by way of discharge or dismissal. The Supreme Court held that :

> "It is difficult to understand how a strike in respect of a public utility service, which is clearly illegal could at the same time be justified. These two conclusions cannot in law exist, the law has not made any distinction between an illegal strike which may be said to be justified and one which is not justifiable".

1. AIR 1978 SC 1489.
2. *Ibid.*
3. *Ram Krishna Iron Foundry, Howrah* v. *Their Workers*, (1954) 2 LLJ 372 (LAT).
4. *Punjab National Bank Ltd.* v. *Its Workmen*, (1952) 2 LLJ 648 (LAT).
5. (1990) 4 SCC 744.
6. AIR 1960 SC 219.

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It was further observed by the Supreme Court that in case of an illegal strike the only question of practical importance would be the quantum of punishment. To decide the quantum of punishment a clear distinction has to be made between violent strikers and peaceful strikers.

(1) Violent strikers are those workmen who obstruct the loyal workmen from carrying on the work or take part in violent demonstrations and act in defiance of law and order ; and

(2) Peaceful strikers are those workmen who are silent participators in the strike.

The first category of strikers are to be dealt with more severely and the punishment of dismissal, discharge or termination has to be imposed upon them. It would neither be in the interest of industry nor the workmen to effect wholesale dismissal of all striking workmen.[1] The justification of a strike is not to be judged from the result of adjudication of demands. A strike cannot be said to be unjustified unless the reasons for it are absolutely perverse and unsustainable.[2] In *Workers of Bihar Fire Bricks and Potteries Ltd.* v. *Management,*[3] six workmen of the Company were dismissed. The union demanded their reinstatement and there was one hour token strike to protest against the dismissal order. The management ordered deduction of wages for the strike period. In consequence of it there was another one hour strike. The Tribunal held the strike as illegal. The Appellate Tribunal held the order of deduction as bad. It observed that strike is a weapon of expressing protest and if the deductions are allowed to be made, it would amount to denying the workmen their right which they have achieved after a great deal of struggle and sacrifice.

In *Bata Shoe Company (Private) Ltd.* v. *D.N. Ganguly*[4] the Supreme Court observed that 'participation in an illegal strike may not be necessarily punished with dismissal, but when an enquiry has been properly held and the employer has imposed the punishment of dismissal on the employee who has been guilty of the misconduct of joining the illegal strike, the Tribunal should not interfere unless it finds unfair labour practice or victimisation against the employee.

Strike is the last weapon. There may, however, be the circumstances where the demand is of such urgent nature that it cannot be reasonably expected from the workmen to wait till after asking the Government to make a reference. In such cases a strike even before such request has been made will be justified.[5] Strike for securing improvement on matters relating to wages, dearness allowance, bonus, provident fund, gratuity, leave and holiday may *prima facie* be considered to be justified because it is the primary object of a Trade Union to secure better conditions of employment of the workmen.[6]

In *Management of the Fertilizer Corporation of India Ltd.* v. *Workmen,*[7] the management was prepared to pay bonus as per Bonus Act. They had also announced the introduction of a production Bonus Scheme. They were taking active part in conciliation proceedings. They made certain proposals to the representatives of the workmen which they promised to discuss with the workmen and give a reply to the management. But the next day the workmen were incited to go on strike. The telegraphic request of the management to postpone the strike by one day was also not complied with by the workmen. In view of the circumstances stated above the demand

1. *India General Navigation and Railway Co. Ltd.* v. *Their Workmen,* AIR 1960 SC 219.
2. *Workers of Bihar Fire Bricks and Potteries Ltd.* v. *Management,* 1953 LAC 81.
3. *Ibid.*
4. (1961) 1 LLJ 303 (SC).
5. *Chandramalai Estate Ernakulam* v. *Its Workmen,* (1960) 2 LLJ 243.
6. *Swadeshi Industries Ltd.* v. *Their Workmen,* (1960) 2 LLJ 78 (SC).
7. AIR 1970 SC 867.

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of the Union regarding *ex gratia* bonus could not be considered to be of an urgent and serious nature. Strike was unjustified and, therefore, workmen were not entitled to any wages for the period of the strike.

In *Syndicate Bank and another* v. *K. Umesh Nayak etc.*,[1] the question for consideration was whether the workmen who proceed on strike, whether legal or illegal are entitled to wages for the period of strike. The necessity arose to refer this question to a larger bench of four judges because in *Management of Churakulam Tea Estate (P) Ltd.* v. *The Workmen and another*,[2] and in *Crompton Grieves Ltd.* v. *Its Workmen*[3] the Supreme Court had expressed its opinion that to entitle a workman to claim wages for the strike period, the strike must be both legal and justified while in *Bank of India* v. *T.S. Kelawala and others*,[4] it was held that whether the strike is legal or illegal, the employees are not entitled to wages for period of strike. It was held in the present case that the question whether the strike was justified or not was not raised in *T.S. Kelawala's* case and therefore, the further question whether the employees were entitled to wages if the strike is justified was neither discussed nor answered. Secondly, the first two decisions were not cited while deciding the other case and hence there was no occasion to consider the said decisions there. They were not cited probably because the question of justifiability or otherwise of the strike did not fall for consideration. The essence of the first two decisions is that if the strike is legal but unjustified or it is illegal but justified, the employees would not be entitled for wages for the period of strike. The view is that for such entitlement the strike must be both legal and justified. Since the question whether the employees are entitled to wages, if the strike is justified did not fall for consideration in *T.S. Kelawala* case, there is only an apparent conflict in the decisions.

It was held by the Supreme Court that the cessation or stoppage of work whether by the employees or the employer is detrimental to the production, economy and to the well being of the society as a whole. It is for this reason that the industrial legislation while not denying the right of strike to workmen has tried to regulate it along with the right of the employer to lock-out and has also provided a machinery for peaceful investigation, settlement, arbitration and adjudication of the dispute between them. When there is a machinery for settlement of disputes resort to strike or lock-out without having recourse to the prescribed means is unjustified and when there is breach of rules it would be illegal. Therefore, the strike or lock-out as a weapon has to be used sparingly for redressal of urgent and pressing grievance when either no means are available or the available means have failed. The justness or otherwise of the action of the employer or employees has, therefore, to be examined on the anvil of the interests of the society which such action tends to affect. In view of the Supreme Court the legality and justifiability of the strike are essentially to be decided by an industrial adjudication. Therefore it was held that the High Court had erred in recording its findings on legality and justifiability of the strike. The order of the High Court was set aside and the Central Government was directed to refer the disputes in regard to the claim for wages for the strike period to the apropriate authority.[5]

In *Iron and Metal Traders Pvt. Ltd., Bombay* v. *M.S. Haskiel & Others*,[6] many strikers were reinstated but the respondent were singled out by the management for drastic treatment. The Tribunal found the action of the employer as discriminatory and

1. (1994) 2 LLJ 836 (SC).
2. (1969) 2 LLJ 407 (SC).
3. (1978) 2 LLJ 80 (SC).
4. (1990) 2 LLJ 39 (SC).
5. *Syndicate Bank and another* v. *K. Umesh Nayak Etc.*, (1994) 2 LLJ 836 (SC).
6. (1983) 2 LLJ 504 (SC).

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therefore ordered reinstatement of three workers and awarded compensation to seven in lieu of reinstatement. The management filed appeal to the Supreme Court and the Supreme Court held the approach of the Tribunal to be fair, just and reasonable.

Whenever an action of forfeiture is taken against an employee on the ground that he participated in an illegal strike and absented himself from duty it is necessary that he should be given an opportunity of being heard. Without observing the principle of natural justice no action of forfeiture should be taken.[1]

Right of striking workmen to reinstatement after termination of strike.—The right of the striking workmen to reinstatement after termination of strike is dependent upon the question whether the strike is the result of unfair labour practice on the part of the employer or not ? If the strike is the result of unfair labour practice for which the employer is to be blamed, the workmen have a right to be reinstated. If the employer is not guilty of unfair labour practice and he has also engaged other workmen in the interim period to continue the work, the striking employees have no right to reinstatement. In the former case the employer must put his employees back to their work after the strike even if he has in the meantime engaged others to carry on the work.[2] What is unfair labour practice is laid down in Section 2(ra) and Schedule V of the Industrial Disputes Act. No workman can be dismissed or terminated for taking part in an illegal strike provided the strike is held to be justified.[3]

In *G.E.C. (Pvt.) Ltd.* v. *The Labour Court, Allahabad*,[4] some workmen employed in G.E.C. Company were dismissed for having taken part in an illegal strike. They were once warned for having been on strike, but they participated in a strike for the second time. The fact of previous warning and then subsequent participation in the strike by the workmen was taken in view while making the order of dismissal. The dismissal was held by the Supreme Court to be *mala fide* and vindictive on the following grounds :

> "If the management had without any regard to what happened in respect of the first strike, imposed punishment under clause 22 of the Standing Orders in respect of an illegal strike which is misconduct under Clause 21(2) of the Standing Orders, after a fair inquiry, the punishment meted out being a managerial function, would not be normally interfered with. But, in this case, even the order of dismissal clearly shows that the management has taken into account the previous conduct of the workmen in having gone, on the first strike, and the punishment of warning, administered on May 8, 1964. It is because of this past conduct, it is further stated, that the six workmen were being dismissed from service."

Right of employer to compensation for loss caused by illegal strike.—In *Rohtas Industries* v. *Its Union*,[5] the Supreme Court held that the remedy for illegal strike has to be sought exclusively in Section 26 of the Act. The award granting compensation to employer for loss of business through illegal strike is illegal because such compensation is not a dispute within the meaning of Section 2(k) of the Act.

Strike by Government Servants.—The rights of a Government servant to go on strike are different from the workmen employed in private concerns. There are different rules which prohibit him to go on strike. Central Government employees are governed by the Central Civil Service (Conduct) Rules, 1955. Rule 4-A which deals with the demonstrations and strike by the Central Government employees enacts that "no Government servant shall participate in any demonstration or resort to any strike in connection with any matter pertaining to his conditions of service." Rule 4-A of the

1. *Shiv Shankar and another* v. *Union of India and others*, (1985) 1 LLJ 437.
2. *Spencer and Co. Ltd.* v. *Their Workmen*, (1966) 1 LLJ 714 (LAT).
3. *Buckingham and Carnatic Mills Ltd.* v. *Workmen*, AIR 1953 SC 47.
4. AIR 1969 SC 235.
5. AIR 1976 SC 425.

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Bihar Government Servants Conduct Rules, 1956 is identical with above Central Rule 4-A. While interpreting Rule 4-A of the Bihar Government Servants Conducts Rules, the Supreme Court in *Kameshwar Prasad* v. *State of Bihar*[1] held that a person did not lose his fundamental rights by joining Government service. These conclusions were supported by Article 33 of the Constitution whereby fundamental rights of the members of the Armed Forces, etc. can be abridged or abrogated by law, thus implying that fundamental rights of other Government servants cannot be abridged. Rule 4-A was held to be valid so far as it referred to strikers, and void in so far as it referred to demonstration because it violated the fundamental right of speech and expression. This decision was followed by the Supreme Court in *O.K. Ghosh* v. *E.R. Joseph*.[2] Thus the provisions of this Act shall apply to Government servants going on strike. Of course they shall further be subject to the conduct rules as framed by the Government concerned. The conduct rules framed by the Government, in order to be valid must not be in contravention of the fundamental rights guaranteed by the Constitution.

Section 25. Prohibition of financial aid to illegal strikes and lock-outs.—Section 25 of the Act prohibits financial aid to illegal strikes and lock-outs. It says that no person shall knowingly spend or apply any money in direct furtherance or support of an illegal strike or lock-out. This section has the following ingredients :

(1) spending or applying money ;

(2) money spent or applied in direct furtherance or support of an illegal strike or lock-out ;

(3) the strike or lock-out must actually be illegal ;

(4) knowledge on the part of the person expending or applying money that the strike or lock-out is illegal.

It is sufficiently clear that the persons spending or applying money must know that the strike or lock-out is illegal. Thus *mens rea* is a necessary element of an offence under this section. The provisions of this section are attracted only if the strike or lock-out is illegal and not otherwise.[3] For any violation of provisions of this section, punishment is provided by Section 28 of the Act. The use of the words "no person" in the beginning of this section means that such person need not necessarily be a workman, he may be any body. Thus even a person who is not a workman can be penalised under Section 28 for violating the provisions of Section 25. The effect of Sections 25 and 28 is that the prosecution to support a conviction for breach of Section 25 must prove that :

(i) the strike or lock-out in question was illegal ;

(ii) the accused had knowledge that—

(a) the strike or lock-out was illegal ; and

(b) the money spent or applied by him was in direct furtherance or support of a strike or lock-out ;

(iii) that the money was actually spent or applied by the accused.

It is only spending of money in support of a strike which is prohibited under this section. Therefore, assistance to the strikers in any other form, for example, supplying clothes, food, etc., is not prohibited under Section 25 of the Act.

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1. 1962 SCR 369.
2. 1963 (1) SCR 789.
3. *State of Bombay* v. *Canfield Holland*, (1953) I LLJ 458 (Bom).

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CHAPTER VIII
LAY-OFF AND RETRENCHMENT

The Industrial Disputes Act, 1947 as originally enacted made no provision for the payment of 'lay off' or 'retrenchment' compensation to the laid-off or retrenched workmen. In the absence of statutory provisions for paying compensation, the authorities had taken into consideration various factors in determining the amount of compensation. Therefore, there were no uniform rule that can be said to have observed by the adjudicating bodies. In 1953 a huge stock had accumulated in textile industries. Textile mills were in a mood to close one or more shifts. The closure must have resulted in retrenchment or laying-off a large number of textile employees causing great unrest in the whole of the textile industry. In order to overcome the situation the President of India promulgated the Industrial Disputes (Amendment) Ordinance, 1953 to take effect from 24th October, 1953. The Ordinance made provision for payment of compensation for lay-off or retrenchment. The said Ordinance was repealed and replaced by the Industrial Disputes (Amendment) Act, 1953 on 23rd December, 1953. Sections 25-A to 25-J were added by this Amending Act of 1953.

The Supreme Court in *Hariprasad Shiv Shanker Shukla* v. *A.D. Divakar*,[1] held that retrenchment means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than on a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and *bona fide* closure of business or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer.

The effect of the Supreme Court's pronouncement was that the Act was again amended on 6th June, 1961 and two new Sections 25-FF and 25-FFF were substituted for old Section 25-FF. By this amendment provision was made for compensation for retrenchment of workmen on transfer of a business or on closing down of an industrial concern. These two sub-sections have again been amended in 1964. These amendments have curtailed the common law rights of the employer and he has now been burdened to pay compensation in cases of lay-off, retrenchment and *bona fide* transfer or closure of the undertaking.

Section 25-A. Application of Sections 25-C to 25-E.—According to sub-section (1) of this Section. Sections 25-C to 25-E inclusive shall not apply to industrial establishments to which Chapter V-B applies or,—

(a) to industrial establishments in which less than fifty workmen on an average per working day have been employed in the preceding calendar month, and

(b) to industrial establishments which are of a seasonal character or in which work is performed only intermittently.

Thus where the exemption under Section 25-A applies, the workmen are not entitled to lay-off compensation and the Tribunal has no right to grant relief on any fanciful notions of social justice.[2] Sub-section (1) exempts such establishments where on an average less than fifty workmen have been employed. Therefore, if on any day

1. AIR 1957 SC 121.
2. *South India Corporation and others* v. *All Kerala Casheswnut Factory Workers' Federation*, (1960) 1 LLJ 103 (Ker).

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more than 50 persons were employed but on an average during the preceding calendar month less than 50 persons are employed, provisions of sub-sections 25-C to 25-E would not apply, and therefore no compensation for lay-off can be claimed.[1] Where it is contested that less than 50 persons were employed in any industrial establishment, the period with reference to which the number of employees is to be determined is the calendar month preceding the point of time when the statutory right under Section 25-C arose.[2] The two expressions "seasonal character" and "intermittent" are not defined in the Act but they are not synonymous. 'Seasonal' implies dependence on nature over which neither the employer nor the employee in the establishment has any control.[3] 'Intermittent' means not continuous but falling after certain gaps or intervals.

Section 25-A(2).—This sub-section provides that "if a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently the decision of the appropriate Government thereon shall be final. This sub-section comes into play in case of any disputed claim to a right or any dispute about the liability thereof, although the dispute need not be an 'industrial dispute' within the meaning of Section 2(k) of this Act. The appropriate Government has jurisdiction to decide any such dispute, and the exercise of this function by the Government is of a *quasi-judicial* nature because it has to give decision in a dispute between the two parties. The decision has normally to be given after giving both the parties reasonable opportunity to represent their case.[4] The decision must be based on considerations relevant to the dispute.

Explanation.—For the purposes of Section 25-A and Sections 25-C to 25-E, the "industrial establishment" means,—

(1) a factory as defined in Section 2(m) of the Factories Act, 1948 ;

(2) a mine as defined in Section 2(j) of the Mines Act, 1952 ;

(3) a plantation defined in Section 2(f) of the Planations Labour Act, 1951.

This definition has a limited application and is not applicable to sections other than those mentioned above.

Section 25-B. Definition of continuous service.—Section 25-B of the Act defines continuous service. The definition of 'continuous service' as given in this section is applicable to this Chapter only. A workman shall be said to be in continuous service for a period, if for that period his service is uninterrupted. It is also provided that any interruption on certain accounts shall not be considered an interruption and the service shall still be deemed to be continuous. These interruptions may be on account of (1) sickness ; or (2) authorised leave ; or (3) an accident ; or (4) a strike which is not illegal ; or (5) a lock-out ; or (6) a cessation of work which is not due to any fault on the part of the workmen.

Sub-section (2) of Section 25-B defines continuous service for a period of one year or a period of six months. Clause (a) of sub-section (2) provides that a workman shall be deemed to have been in continuous service for a year, if—

(1) he has been in employment for 12 calendar months ; and

(2) he actually worked for not less than—

(a) One hundred and ninety days in the case of a workman employed below ground in a mine, and

(b) Two hundred and forty days in any other case.

The following conditions must be fulfilled by a workman to entitle him for a

1. *Tinkori Oil Mills Mazdoor Congress* v. *Tinkori Sadhu Khan and Sons*, II FJR 197 (LAT).
2. *Kohinoor Saw Mills Co.* v. *State of Madras*, 28 (1957) 2 LLJ 210 (Mad).
3. *Ibid.*
4. *Ibid.*

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continuous service of six months. As provided by clause (b) of sub-section (2) these conditions are :—

(1) The workman has been in employment for a period of six calendar months ; and

(2) Such workman has actually worked for not less than—

(a) Ninety-five days in the case of his being employed below ground in a mine ; and

(b) One hundred and twenty days in any other case.

Explanation.—For the purpose of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which—

(i) he has been laid-off under an agreement or as permitted by Standing Orders made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment ;

(ii) he has been on leave with full wages, earned in the previous year ;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment ; and

(iv) in the case of a female, she has been on maternity leave so however, that the total period of such maternity leave does not exceed twelve weeks.

Sub-section (1).—This sub-section provides that taking part in a strike which is not illegal is not an interruption. In case of a person taking part in an illegal strike, an employee may be dismissed for misconduct, but unless an employee is actually dismissed on that account the service shall be deemed to be a continuous service. In case of second category of cases even though the service is interrupted it shall be deemed to be continuous unless it has been terminated, for instance, by an order of dismissal for taking part in an illegal strike.[1]

It was held in the *Workmen of American Express International Banking Corporation* v. *The Management of American Express International Banking Corporation*,[2] that for the purposes of determining continuous service a workman must have actually worked for 190 or 240 days as the case may be. Sundays and other paid holidays during which a workman was in the employment of the employer and for which he had been paid wages shall be taken into account for reckoning number of days on which a workman is said to have actually worked.

Sub-section (2).—Under clauses (a) and (b) of sub-section (2) the two conditions providing for one year's or six months' continuous service, as the case may be, must be simultaneously fulfilled. Non-fulfilment of even one of them will not entitle the workmen to be treated in continuous service. That means for a continuous service of one year a workman must have served for 12 calendar months and also have worked for 240 or 190 days. If he has served for less than 12 calendar months he will not be deemed to be in continuous service even if he has served for 240 or 190 days as the case may be. Similarly, a workman who has served for 12 calendar months but has worked for less than 240 or 190 days, as the case may be, will not be deemed to have been in continuous service.

In *Chaggan Lal* v. *Panchayat Samiti*,[3] it was held that Sundays and other paid holidays have to be taken into account for the purposes of reckoning the total number of days on which the workman can be said to have actually worked within the 'deemed' meaning of continuous service of one year within the meaning of Section 25-B.

1. *Jairam Sonu Shogale* v. *New India Rayon Mills Co. Ltd.*, (1958) I LLJ 28 (Bom).
2. (1985) 2 Lab LJ 539 (SC).
3. (1990) Lab IC 1463 (Raj).

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Section 25-C. Right of workmen laid-off for compensation.—Section 25-C of this Act entitles a workman to get compensation from the employer for the period he is laid-off. When the employer is unable to provide work to his workmen for reasons beyond his control, he owes a duty to pay lay-off compensation to such workmen. Before a workman may claim lay-off compensation he must fulfil the following conditions :

(1) his name must be borne on the muster rolls of an industrial establishment ;

(2) he must have completed at least one year's continuous service (what is continuous service is defined in Section 25-B) ;

(3) the workman must not be a badli or a casual workman.

If the above requirements, are fulfilled a workman whether laid-off continuously or intermittently, shall be paid compensation. The compensation payable shall be for all days during which he is so laid-off, except for such weekly holidays as may intervene. The amount of compensation payable shall be equal to fifty per cent of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid-off.

The above rule is subject to the following limitations :

(1) If during any period of twelve months a workman is laid off for more than forty-five days, no compensation shall be payable in respect of any period of the lay-off after the expiry of the forty-five days provided there is an agreement between the workman and the employer to this effect. Thus compensation is payable for a maximum period of 45 days during a period of twelve months and for a period longer than 45 days if there is no agreement to the contrary between employer and workman.

(2) Where a workman is laid-off for a period of 45 days during a period of twelve months, the employer has a right to retrench such workman at any time after the expiry of 45 days of lay-off. When an employer decides to retrench a workman he must comply with the requirements of Section 25-F of the Act. Any lay-off compensation paid to the workman during the preceding twelve months may be set off against the compensation payable for retrenchment.

Lay-off compensation.—Lay-off is defined in Section 2(kkk) of the Act. Therefore, to claim a lay-off compensation under Section 25-C two conditions must be fulfilled, namely :—

(i) the workman must have been laid off for reasons contemplated by Section 2(kkk) ; and

(ii) requirements as provided by Section 25-C must be fulfilled.

Lay-off compensation is governed by provisions of Chapter V-A and not by Standing Orders by virtue of Section 25-I. The Tribunal has no right to enquire, whether the lay-off could have been avoided or not.[1] In *Tatanagar Foundry Co.* v. *Their Workmen*,[2] the Supreme Court held that unless the *mala fide* on the part of the management or the employer are proved, the Tribunal has no jurisdiction to enquire that a more prudent management could have avoided the lay-off. The question whether an employer was responsible for deliberately bringing about the situation leading to lay-off, or whether the workmen were laid-off in order to victimize them for some other ulterior motives, may be determined by the Tribunal and such findings of fact are not to be interfered with by the High Court under Article 226 of the Constitution.

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1. *R.B.B.A. Mills, Co.* v. *Labour Court, Nagpur*, AIR 1972 SC 451.
2. (1962) 1 LLJ 382 (SC).

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In *Workmen F.T. & R. Co.* v. *F.T. & R. Co.*,[1] the respondent were a tyre manufacturing company at Bombay having its distribution office at Delhi. Thirty workmen were employed in Delhi office. As a result of strike in the Company there was short supply of tyres to the distribution office. Out of 30 workmen 17 were laid-off by the management. There was no certified standing orders, nor was there any term of contract of service conferring any right of lay-off. It was held that the workmen were laid-off without any authority of law or the power in the management under the contract of service. Such a case is not covered by Chapter V-A of this Act. Therefore the workmen would be entitled to their full wages, but in case of a reference under Section 10(1) the Tribunal may award a lesser sum depending upon the justifiability of the lay-off. Lay-off compensation is payable only in those cases to which Chapter V-A applies.

The provisions for payment of compensation for lay-off does not mean that the employer can pay lay-off compensation and declare lay-off. Payment of compensation is not a condition precedent to lay-off. Compensation cannot be awarded in advance of actual lay-off.[2] The employees of an Oil Mill were laid-off upto the next crushing season and the lay-off lasted for more than fifty-seven days. The union demanded lay-off compensation for the whole period for they alleged that the lay-off was illegal. The Labour Appellate Tribunal held that lay-off was justified but ordered the workmen to be paid half the full wages and dearness allowance not only for 45 days but for the entire period of lay-off. The Supreme Court in appeal held that the Tribunal after holding that the lay-off was justified was wrong in awarding compensation for more than 45 days.

Second proviso to Section 25-C provides that where a lay-off for a period of 45 days during twelve calendar months has expired and thereafter the period of lay-off comprises one week or more at a time the employer has a choice either (i) to continue payment of compensation for subsequent period under Section 25-C ; or (iii) to retrench the workmen under second proviso. If the employer decides to retrench, he must observe the conditions precedent to retrenchment of workmen as prescribed under Section 25-F of the Act.

Badli Workman.—Explanation to Section 25-C provides that a "badli-workman" means a workman who is employed in an industrial establishment in the place of another whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year's continuous service in the establishment. Thus it is clear that when some workman whose name is actually borne on the muster rolls is absent, someone else is employed in his place on the days he remains absent, and such other person is called a Badli Workman. Any such person after completion of one year's continuous service shall cease to be a "badli workman". It means if a 'badli workman' has completed one year's service and is available, the employer must either put him to work or provide lay-off compensation. A 'badli workman' is one whose name is not borne on the muster rolls of the establishment. Therefore, if the name of a workman, even if he is a 'badli workman', is found on the muster rolls, he is entitled to lay-off compensation.[3] The factor which is relevant for deciding the rights of compensation is his name being found on the muster rolls and not how he is described therein.[4]

Section 25-D. Duty of an employer to maintain muster rolls of workmen.—Section 25-D of the Act imposes a duty upon the employer to maintain a muster roll for the purposes of this Chapter. The employer shall also provide for making

1. AIR 1976 SC 1775.
2. *K.T. Rolling Mills* v. *M.R. Meher*, (1962) 2 LLJ 667 (Bom).
3. *Vijaya Kumar Mills* v. *Labour Court*, (1960) 2 LLJ 567 (Mad).
4. *Ibid.*

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of entries in the muster rolls by workmen who may present themselves for work at the appointed time during normal working hours. Every workman who has been laid off is required to present himself for work at the establishment on each working day at the appointed time. He shall make entry in the muster rolls maintained by the employer. A workman who does not so present himself and sign the muster rolls shall not be entitled to claim lay-off compensation. The duty imposed upon the employer by this section is also mandatory and non-compliance will debar the employer to take advantage of Section 25-E (ii) of the Act.

Section 25-E. Workmen not entitled to compensation in certain cases.—Section 25-E provides that a laid-off workman shall not be entitled to compensation :—

(1) if he refuses to accept alternative employment provided that such alternative employment is offered :

(a) in the same establishment or in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment to which he belongs ; and

(b) if in the opinion of the employer, the alternative employment does not call for any special skill or previous experience and can be done by the laid-off workman ; and

(c) if the wages which would normally have been paid to the workmen in his previous employment are offered for the alternative employment also ;

(2) if he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day ;

(3) if the lay-off is due to strike or slowing down of production on the part of workmen in another part of the same establishment.

Any alternative employment.—'Any alternative employment' means similar or like employment and it must be one which can be done by the workman. The expression "can be done" means the workman must not only be capable of doing it but it should also be acceptable to him. Where skilled workmen were offered jobs of coolies and mazdoors, which they refused, the refusal of offer was held not to forfeit their claims to lay-off compensation.

Clause (ii).—Clause (ii) requires a workman to present himself for work at the establishment daily, if he does not he cannot claim lay-off compensation. But his absence does not disentitle him to reinstatement after the lay-off is over. In view of Mr. Chief Justice Chagla, the employee during the period of lay-off is entitled to go and serve another master. The only effect of his not presenting himself daily for work at the establishment or serving another employer during the period of lay-off would be that he will not be entitled to lay-off compensation for that period, but he will still have a right to be reinstated when the proper occasion arises.[1]

Clause (iii).—The employer is exonerated from his liability to pay compensation where lay-off is due to strike or slowing down of production on the part of the workmen in another part of the establishment.[2] Thus the management will be quite justified in refusing to give work to the workmen in one part of the establishment, on account of strike by workmen in another part of the establishment.[3]

Industrial establishment.—The Act does not provide any test to determine what

1. *Nutan Mills Ltd.* v. *Employees' State Insurance Corporation*, (1956) 1 LLJ 215 (Bom).
2. *Zandu Pharmaceutical Works Ltd.* v. *R.N. Kulkarni and Co.*, (1966) 1 LLJ 560 (Bom).
3. *Lone Tree Estate* v. *Industrial Tribunal*, (1962) 2 LLJ 319 (Kerala).

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is one establishment. Where any industrial establishment consists of a number of branches, departments or units situate in the same or different places, the question of determining the oneness of the establishment becomes very difficult. In *Associated Cement Companies Ltd., Jhinkapani* v. *Their Workmen*,[1] the question for determination arose whether the limestone quarry was part of a cement factory run by the same employer in the same vicinity. The following tests were considered by the Supreme Court, namely :—

(a) Geographical proximity of two parts of an establishment or location of the establishment[2] ;

(b) Unity of ownership, whether both parts of an establishment are owned by the same or different employer ;

(c) Management and control of the two parts ;

(d) Unity of employment and conditions of service ;

(e) Functional integrality, *i.e.*, whether one unit can exist independently of the other, or their existence is inter-dependent.

(f) General unity of purpose.

(g) Ultimate amalgamation of accounts was also suggested as one of the tests by the Bombay High Court.[3]

Mr. Justice S.K. Das observed : "If in their true relation they constitute one integrated whole, we say that the establishment is one, if on the contrary they do not constitute one integrated whole each unit is then a separate unit. The difficulty on applying these tests arises because of the complexities of modern industrial organisation ; many enterprises may have functional integrality between factories which are separately owned ; some may be integral in part with units of factories having the same ownership and in part with factories or plants which are independently owned. In the midst of all these complexities, it may be difficult to discover the real thread of unity".[4]

Four companies were situate in the same premises. They were engineering concerns engaged in production of different types of iron and steel goods. They had a common time office, cash office, works manager, labour officers, common standing orders, common canteen and common administrative heads. Industrial dispute relating to these companies were referred for adjudication by one order of reference. The Supreme Court in special appeal held that the things which the four companies had in common were sufficient to show that they constituted one integrated establishment.[5]

Section 25-F. Conditions precedent to retrenchment of workmen.—Section 25-F lays down the requirements for a valid retrenchment. However, these conditions apply in case of retrenchment of an employee who has been in continuous service for not less than one year.[6] The section prescribes three conditions for a valid retrenchment, namely :—

(a) The workman should be given one month's notice in writing indicating the reasons of retrenchment. Retrenchment should be effected after the expiry of the period of notice. If no such notice is given, the workman must be paid in lieu of such notice wages for the period of notice.

(b) The workman has been paid, at the time of retrenchment, compensation.

1. (1960) 1 LLJ 1 (SC).
2. *Indian Cable Co. Ltd.* v. *Its Workmen*, (1962) 1 LLJ 409 (SC).
3. *Tulsidas Khimji* v. *F. Jeejeebhoy*, (1961) 1 LLJ 42 (Bom).
4. *Indian Cable Co. Ltd.* v. *Its Workmen*, (1962) 1 LLJ 409 (SC).
5. *National Iron and Steel Co. Ltd.* v. *State of West Bengal*, (1967) 2 LLJ 23 (SC).
6. *Mahan Lal* v. *Bharat Electronics Ltd.*, (1981) 2 LLJ 70 (SC).

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equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.

(c) Notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette. Provisions relating to notice of retrenchment are contained in Rule 76 of the Industrial Disputes (Central) Rules, 1957.

The requirement of paying compensation is a mandatory pre-condition for retrenchment of a workman, therefore, its non-compliance will render a retrenchment invalid[1] and would attract the penalty under Section 31(2) of the Act.[2] If retrenchment is proved unlawful, the workman has a right to reinstatement with continuity of service and right to wages for such period.

Termination of service of a workman for any reason other than those excepted in Section 2(oo) amounts to retrenchment. If pre-requisites for a valid retrenchment have not been complied with, the termination of service would be void *ab initio*. Therefore, the workman would be entitled to a declaration that the workman continued to be in service with all consequential benefits[3] and if he was not paid all the benefits including salary he shall be entitled to recover the same as arrears.[4]

Extent of Tribunals Jurisdiction.—If a scheme of reorganization has been adopted by an employer for reasons of economy or convenience and it has been adopted in all the areas of its business, the fact that its implementation could lead to the discharge of some of the employees would have no material bearing on the question as to whether the scheme was adopted by the employer *bona fide* or not.[5] In the circumstances, an Industrial Tribunal considering the issue relating to retrenchment, should not attach any importance to the consequences of reorganization. The resulting discharge and retrenchment would have to be considered as inevitable though unfortunate consequence of such a scheme.[6]

Right of employer to reorganize his business.—The employer has a right to organize and arrange his business in the manner he considers best. So long as this is done *bona fide* the Tribunal cannot question its propriety. If such a scheme for reorganisation results in surplusage of employees, no employer is expected to carry the burden of such economic dead-weight. In such a situation the retrenchment has to be accepted as inevitable, however, unfortunate it is so long as it is not vitiated by considerations of victimisation or unfair labour practice.[7]

Clause (a).—This clause requires the employer to give notice of retrenchment or pay wages in lieu of it. These provisions are mandatory and non-compliance will render retrenchment illegal.[8] The order of winding up of a company was passed on 5th December, 1960. Workers were discharged one month thereafter on different dates. It was held that the workmen had already worked for more than the notice period and drawn salary for the said period, therefore, were not entitled to one month's pay in lieu of notice.[9]

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1. *D.C. & G. Mills* v. *Shambhu Nath*, AIR 1978 SC 88 ; *State of Bombay* v. *Hospital Mazdoor Sabha*, (1960) 1 LLJ 251 (SC).
2. *Melby D'Cruz* v. *Travancore Mineral Ltd.*, (1967) 2 LLJ 637 (Kerala).
3. *Mohan Lal* v. *Bharat Electronics Ltd.*, (1981) 2 LLJ 70 (SC).
4. *Deshraj Sood* v. *Industrial Tribunal and others*, (1985) 1 LLJ 74 (Pat).
5. *Parry and Co. Ltd.* v. *P.C. Pai*, AIR 1970 SC 1334.
6. *Ibid.*
7. *Ibid.*
8. *National Iron and Steel Co.* v. *State of West Bengal*, (1967) 2 LLJ 23 (SC).
9. *Pallai Central Bank Employees' Union* v. *Pallai Central Bank Ltd.*, (1966) 1 LLJ 533 (Kerala).

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Non-compliance with either of the conditions precedent to retrenchment prescribed by Section 25-F would make retrenchment invalid and inoperative. The retrenchment is null and void if the notice period is less than one month or wages in lieu of notice are not paid or the notice does not indicate the reason for retrenchment, so also where the rule of "last come first go" is not followed and the reasons for departing from this principle are also not disclosed, the termination is invalid.[1] Notice of change in conditions of service is different from notice for a valid retrenchment under Section 25-F. The requirement of giving notice under Section 25-F cannot be dispensed with on account of proviso (b) of Section 9-A.[2]

Clause (b).—The amount of compensation is as provided in clause (b). The quantum of compensation cannot be exceeded on the ground of social justice or unjustified retrenchment.[3] The right of compensation vests in the workman on the fulfilment of conditions, and therefore, after his death, his heirs are legally entitled to enforce their claim to the compensation from the employer.[4] The retrenchment compensation becomes payable on the fulfilment of the following conditions, namely :

(1) if there is retrenchment within the meaning of Section 2(oo), and

(2) requirement of Section 25-F are satisfied.

Compensation can be recovered from the employer either under Section 33-C of this Act, or under Payment of Wages Act. When the compensation as due is actually tendered unconditionally it amounts to payment even if it is refused by the workman with a view to invalidating retrenchment.[5]

In *State Bank* v. *S. Money*,[6] the date of termination of services were written in the appointment order itself. The question was whether a stipulation in the appointment order regarding termination of employment amounts to termination of services within the meaning of Section 2(oo) of the Industrial Disputes Act, 1947, so as to attract the provisions of Section 25-F(b) for the purposes of payment of compensation. Krishna Iyer, J. held that an employer terminates employment not merely by passing an order as the service runs, he can do so even by writing a composite order, one giving employment and the other ending or limiting it. A separate subsequent determination is not necessary to attract the provisions of Section 25-F(b) of the Act. It has been reiterated by the Supreme Court in *Hindustan Steel* v. *Labour Court, Orissa*,[7] that the termination of service by running out of time stipulated in the contract of service amounts to retrenchment. Non-compliance of Section 25-F (b) renders the retrenchment illegal, and therefore, Labour Court may order reinstatement of the employee with full back wages.

In *Gurmail Singh and others* v. *State of Punjab and others*,[8] Tubewell operators in the Irrigation branch of the Public Works Department of the Punjab State were transferred to Punjab State Tubewell Corporation, a company wholly owned by the State of Punjab. All the permanent posts were abolished and temporary posts were discontinued. Notices of termination were issued to the operators who challenged the same on the ground of violation of clauses (b) and (c) of Section 25-F. The amount of retrenchment compensation was sent by individual drafts to the divisional/sub-divisional offices to be taken by workmen on the date of retrenchment. It was held that since the

1. *Malkhan Singh* v. *Union of India*, (1981) 2 LLJ 174 (SC).
2. *L. Robert D'Souza* v. *Executive Engineer Southern Railway*, (1982) Lab IC 811.
3. *Bhartiya Machine Tool Co. Ltd.* v. *General Secretary, Bharitya Mill Sramik Congress*, 1966 LAC 409 (LAT).
4. *K.P. Dass & Co.* v. *Howrah Zila Loha Mazdoor Congress*, (1956) 1 LLJ 679.
5. *National Iron and Steel Co.* v. *Third Industrial Tribunal*, (1964) 1 LLJ 525 (Cal).
6. AIR 1976 SC 1111.
7. AIR 1977 SC 31.
8. (1991) 2 Lab LJ 76 (SC).

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individual compensation drafts for the amounts due were forwarded to the various offices sufficiently in time to be available to be taken by them on the date of retrenchment there was sufficient compliance with the provisions of clause (b) of Section 25-F. The requirement under clause (c) of Section 25-F is only directory and not mandatory. Sending of notices of retrenchment to the concerned authorities through the peon book is sufficient compliance with the statute and there is no obligation to send it by registered post only. It was further held that since the tubewells were not being operated profitably by the Government, the decision of the Government to run them by the Corporation does not lead to *mala fides* on the part of the Government.

In *P.K. Kumaran* v. *Idukki Jilla Motor Mazdoor Sangh (BMS) and another*,[1] the tribunal considered the evidence given by the employee that it is the usual practice that a conductor and driver in a bus will work only 15 days in a month and according to the evidence of employer they will work for 20 days in a month and their duration of working hours in a day is 10 to 12 hours. They are not paid any overtime wages. Although a bus crew will work only for 20 days they were paid wages for one month on the assumption that they had worked for the whole month. In the light of above finding the Industrial Tribunal rejected the contention of the employer that the workman had not worked for 240 days in a calendar year immediately preceding the date of his retrenchment. It was held by the High Court that the finding of the tribunal is justified in the light of the provisions of Section 25-F of the Act.

Retrenchment Compensation and Gratuity.—The Supreme Court in *Indian Hume Pipe Company* v. *Their Workmen*,[2] held that gratuity is intended to help a workman after retirement, whatever may be the cause of retirement and retrenchment compensation is expected to give some relief to tide over the difficulties caused by sudden termination of employment. The law as pointed out by the Court does not prevent payment of both gratuity and retrenchment compensation and the gratuity schemes for that purpose may provide that either retrenchment compensation shall be payable in lieu of gratuity or gratuity shall be payable in addition to the retrenchment compensation. Therefore, whether a retrenched workman may claim the benefit of a gratuity scheme in addition to retrenchment compensation under Section 25-F or not depends on the construction of relevant provisions of the grauity scheme considered in the light of provisions of Section 25-F of the Act.

In *Pioneer Ltd.* v. *Tajdar Hussain*[3] the respondent, a workman of Pioneer Ltd., died during the pendency of appeal in the Supreme Court. The employer offered to pay to the legal representative of the deceased Rs. 1000/- as *ex-gratia* over and above the retrenchment compensation allowed under Section 25-F. The offer of the employer was held by the Court to be fair.

In *Workmen of Coimbatore Pioneer "B" Mills Ltd.* v. *Labour Court*,[4] some workmen were retrenched by the management. The Labour Court finding the retrenchment as *bona fide* awarded a month's wages in lieu of reinstatement. The High Court, while upholding the award, raised the amount to two months' wages. The Supreme Court in appeal held that it was fair and reasonable to raise the compensation payable to each workman instead of reinstatement.

Clause (c).—Clause (c) requires the employer to serve a notice on the appropriate Government regarding retrenchment. Section 25-F prescribes three conditions precedent to retrenchment. The Supreme Court in *Bombay Union of Journalists* v. *State of*

1. (1995) 1 LLJ 323 (Kerala).
2. (1959) 2 LLJ 830 (SC).
3. AIR 1974 SC 1809.
4. (1980) 1 LLJ 503 (SC).

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Bombay,[1] observed that clause (c) cannot be held to be a condition precedent like clauses (a) and (b) even though it has been included in Section 25-F which prescribes conditions precedent. It was further held that unlike clauses (a) and (b), clause (c) does not protect the interest of the workman but it is intended to keep the Government informed about conditions of employment in the industries within its area.[2] Therefore, failure to serve a notice on the appropriate Government would not invalidate the retrenchment. At the same time breach of Section 25-F(c) was held by the Supreme Court to be serious matter[3] and it attracts penalty under Section 31(2). Therefore, a notice in the prescribed manner must be served, if not before, then after retrenchment, and in that sense clause (c) is mandatory like the other two clauses (a) and (b).

Section 25-F does not give right of retrenchment to an employer but only requires certain conditions to be fulfilled by him in case of retrenchment. The employer on fulfilment of the conditions precedent as provided in Section 25-F shall have an unrestricted right to retrenchment of the workman.[4]

In *Santosh Gupta* v. *State Bank of India*,[5] an employee of the Bank was discharged on the ground that she failed to pass the prescribed test for confirmation. The conditions prescribed by Section 25-F had not been complied with therefore, she was reinstated with full back wages. It was held that there cannot be any doubt that the expression "termination of service for any reason whatsoever" covers every termination of service except those not expressly included in Section 25-F or not expressly provided for by the other provisions of the Act such as Sections 25-FF, and 25-FFF.

Termination of services of a temporary employee on the ground of surplus labour amounts to retrenchment and the employee is entitled to claim retrenchment compensation.[6] In *Punjab State Seeds Corporation, Chandigarh* v. *Labour Court, Jullunder and another*,[7] the termination of service of the workman brought about on account of alleged non-availability of work has been held to be retrenchment. It was also held that the provisions of Section 25-F are to be complied with by the employer in the case of retrenchment of the workman whether he is permanent or temporary or casual or daily wage earner. The workman has only to prove that he has worked under the employer for 240 days within a period of 12 months preceding the date of termination of service for the purpose of invoking Section 25-F.

Reinstatement of a retrenched workman.—In *Surendra Kumar Verma* v. *Central Govt. Indl. Tribunal*,[8] the Supreme Court held that when retrenchment of a workman is invalid reinstatement can be ordered. When the order terminating the services of a workman is struck, it is as if the order has never been and so it must ordinarily lead to back wages also. Where a workman is entitled to be reinstated with full back wages but employer prefers to pay compensation instead of re-instating him, it is necessary that adequate amount of compensation should be paid to him in order to meet justice.[9] But there may be exceptional circumstances which make it impossible or wholly inequitable *vis-a-vis* the employer and the workmen to direct reinstatement with full back wages. For instance the industry might have closed down or might be in severe financial doldrums, the workmen concerned might have secured better or other employment elsewhere and so on. In such a situation the Court has discretion to make consequential

1. (1964) 1 LLJ 351 (SC).
2. *Ibid.*
3. *Ibid.*
4. *Chopra Motors* v. *Their Workmen*, (1957) 2 LLJ 162 (LAT).
5. (1980) 2 LLJ 72 (SC).
6. *Management W.B. India Ltd.* v. *Jagannath*, AIR 1974 SC 1166.
7. (1995) 2 Lab LJ 333 (P & H).
8. (1981) 1 LLJ 386 (SC).
9. *Nawal Kishore* v. *M/s. Dorabshaw B. Cursetjee & Sons* (1984) 2 LLJ 473 (SC).

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orders.

In *Hari Mohan Rastogi* v. *Labour Court*[1] the services of a town incharge were terminated by the U.P. State Electricity Board with effect from December 31, 1967. On December 4, 1968, he was re-employed as Sub-station Assistant and was confirmed in that post. It was held that the termination of services with effect from December 31, 1967 will constitute retrenchment and since the conditions precedent to retrenchment were not fulfilled the retrenchment was invalid and inoperative. Therefore the employee would continue in service as Town incharge without any break. However, while working out arrears of back wages payable to him credit will be given for what the employee had received.

In *Nathaniel Masih* v. *U.P. Scheduled Caste Finance and Development Corporation Ltd. and others*,[2] the services of a Driver of the Corporation were terminated without paying any compensation under Section 25-F of the Act. The function of Corporation is to organise and work in various ways for upliftment of down trodden, help them financially for various purposes, including starting industries and helping them in getting technical training It was held that in view of the various activities being carried on by the corporation it is an industry within the meaning of the Industrial Disputes Act and termination of their services amounts to retrenchment which being in violation of Section 25-F is illegal.

In *Karnataka State Road Transport Corporation, Bangalore* v. *Sheikh Abdul, Khader*[3] the services of some of the employees were terminated either during the initial period of probation or during the extended period of probation on the ground of unsuitability. It was held that the termination of service of a probationer would also amount to retrenchment. The order of termination was void because the requirements of Section 25 had not been complied with.

In *M/s. Gammon India Ltd.* v. *Sri Niranjan Dass*,[4] the services of a senior clerk were terminated due to reduction in the volume of business of the company as a result of recession in work. The employer gave evidence before the Tribunal that termination of services was due to closure of office at Delhi. The retrenchment was held to be illegal and the employee continued to be in service and was entitled to wages.

In *Baba Saheb Devgonda Patil* v. *M.D. Shri Panchgonda Sahakari Sakhar Karkhana Ltd., Ichalkaranji and another*,[5] the question was whether Section 25-F is applicable to an employee who had remained absent for about three years without any justification and whose name is thus struck off from the rolls by the employer. It was held that long and continued absence for years together without any reason or justification, and without anything more can give rise to an inference of abandonment of employment by the employee. In such circumstances deletion of the name of the employee cannot be considered to attract Section 25-F of this Act.

It was held in *Yashwant Singh Yadav* v. *State of Rajasthan and others*[6] that the definition of workman in Section 2(s) does not make a distinction between a full time employee and a part time employee. The termination of even a part time employee amounts to retrenchment and if provisions of Section 25-F are not followed the retrenchment will not be valid.

Similarly in *Alex Fernandes of Bombay* v. *(Smt.) N.A. Kadam and another*,[7] the

1. (1984) 1 LLJ 32 (SC).
2. (1991) 2 Lab LJ 347 (All).
3. (1984) 1 LLJ 110 (SC).
4. (1984) 1 LLJ 233 (SC).
5. (1988) 2 Lab LJ 413 (Bombay).
6. (1991) 1 Lab LJ 501 (Raj).
7. (1988) 2 Lab LJ 287 (Bombay).

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question was whether a workman who was in service of the employer for about 11 years could be validly retrenched for being absent for more than a year unauthorisedly and being irregular. The workman remained absent in 1974 and 1975 but was retrenched in 1977 without following the rule of last come first go. It was held that the workman was retrenched by way of punishment for his long absence without giving him a reasonable opportunity of being heard to explain his misconduct. The action of the company was not *bona fide* and retrenchment was *void ab initio*. The employee was entitled to reinstatement with full back wages and continuity of service.

It was held in *Baldev Singh* v. *Labour Court, Chandigarh and another*,[1] that contravention of Section 25-F renders the order of termination void and inoperative and entitles the workman to the relief of reinstatement with full back wages. If no reasons are given to depart from the normal rule of awarding full back wages, the workman is entitled for the same.

In *Municipal Committee Amloh* v. *Labour Court, Patiala and Another*,[2] respondent No. 2 was initially appointed as a clerk against the leave vacancy and later on against a vacancy caused by suspension of Smt. Savitri Sharma. Later on Smt. Sharma obtained a stay order and hence respondent No. 2 was relieved of her duties. She had completed more than 240 days of service. The Labour Court ordered that the employee in question should be reinstated with continuity of service and full back wages which order was challenged in a writ. It was held that the workman had completed 240 days of service and provisions of Section 25-F have not been complied with. Therefore the award of the Labour Court cannot be said to suffer from any legal infirmity.

In *Shiv Kumar and others* v. *State of Haryana and others*,[3] the management sought to retrench 79 of its workmen but the authority granted permission to retrench only 58 workmen on the basis of a settlement reached between the management and representative of its workmen. The joint secretary of the union challenged the settlement on the ground that the union leaders had colluded with the management, and so, the settlement arrived at was bad in law. Second contention was that the workmen concerned had not been personally served with the copy of application as required by Section 25-N of the Act and Rule 76-A(2). It was held that Rule 76-A(2) requires that application shall be made in triplicate and copies of the same shall be served by the employer on the workmen. Nothing is mentioned in the application about the proof of service to the workmen concerned. Therefore the permission to retrench workmen is not in accordance with law. However, relief of reinstatement was held not to be proper but it was held that interest of justice would be served if a sum of Rs. 1000/- is paid to each workman apart from what is due as a retrenchment compensation under Section 25-F (b) of the Industrial Disputes Act.

Fresh Plea.—In *Workmen of Sudder Workshop* v. *The Management*[4] twenty three workmen were retrenched by the management. The Tribunal held that in case of 16 workmen the action was justified but in the case of the other seven the rule of 'last come, first go' was not followed, so reinstatement was ordered. Both the parties appealed. In case of 16 workmen it was pleaded that retrenchment was bad because compensation was not paid in terms of the Wage Board decision. The High Court refused to entertain this plea because it was neither pleaded nor proved before the Tribunal. Therefore, the Supreme Court upheld the view of the High Court because no such question can be allowed to be raised for the first time before the High Court.

Distinction between Sections 25-F and 25-FFF.—In *A.S. Production Agencies* v.

1. (1991) 2 Lab LJ 534 (P & H).
2. (1992) 2 LLJ 815 (P & H).
3. (1995) 1 LLJ 1162 (SC).
4. (1980) 2 LLJ 134 (SC).

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Industrial Tribunal, Haryana,[1] the Supreme Court pointed out the distinction between Sections 25-F and 25-FFF. By the former section a prohibition against retrenchment, until the conditions prescribed by that section are fulfilled, is imposed ; by Section 25-FFF (1) termination of employment on closure of an undertaking without payment of compensation and without either serving notice or paying wages in lieu of notice is not prohibited. Payment of compensation and payment of wages for the period of notice are not, therefore, conditions precedent to closure.

Section 25-FF. Compensation to workmen in case of transfer of undertakings.—Section 25-FF provides that in case of transfer of ownership or management of an undertaking from one employer to another every workman :—

(a) shall before such transfer be entitled to notice, and

(b) shall also be entitled to compensation in accordance with the provisions of Sections 25-F as if the workman had been retrenched.

To entitle a workman to compensation under this section the following conditions must be simultaneously complied with, namely :

(1) a transfer of ownership, or management of an undertaking from one employer to another either (i) by agreement or (ii) by operation of law ;

(2) the undertaking in question must be an industry within the meaning of Section 2(j) and the workman should be a workman within the meaning of Section 2(S) ; and

(3) the workman must have put in a continuous service of not less than one year in that undertaking immediately before the transfer of ownership or management of the undertaking.

The proviso to Section 25-FF lays down that a workman shall not be entitled to benefits under this section in case of change of employers by reason of the transfer if :—

(1) the service of the workman has not been interrupted by the transfer ;

(2) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer ; and

(3) the new employer is under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

For the application of Section 25-FF it is necessary that the ownership or management of an undertaking must have been transferred from one employer to another. In case of transfer of ownership or management not covered by the proviso to this section, the employees become entitled to notice and compensation, and provisions of Section 25-F are also attracted because the transfer results in the retrenchment of employees. Reference to Section 26 is made only for the purpose of calculating the amount of compensation payable to workmen.[2]

In *Board of Directors of South Arcot Electricity Distribution Co. Ltd.* v. *Elumalai*,[3] the South Arcot Electricity Undertaking was taken over by the State. The conditions of service were less favourable to workmen under the State Government as compared to the old employer before transfer of the undertaking. The workmen claimed compensation from the company. The company pleaded not liable. It was held that the

1. AIR 1979 SC 170.
2. *Ankapalla Co-operative Agricutural and Industrial Society* v. *Its Workmen*, (1962) 2 LLJ 621 (SC).
3. (1970) 2 SCJ 118.

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proviso to Section 25-FF cannot be invoked by the company for the purpose of defeating the claim of the workmen under the principal clause of that section. According to Section 25-FF, if the right to retrenchment compensation accrues under it, it must be a right to receive that compensation from the previous employer who was the owner on the date of transfer.

Where earned leave was not availed of by workmen before closure or transfer of undertaking, compensation shall not be payable in absence of any provision in statute governing right to such compensation.[1]

The Ambala Cantonment Electric Supply Corporation was taken over by the Punjab State Electricity Board in accordance with the provisions of Indian Electricity Act, 1910. Its employees were asked to appear for interview and only some of them were employed by the Board as fresh entrants ; neither the continuity of their service nor the pay drawn by them was protected. The workmen demanded retrenchment compensation from the petitioner company under Section 25-FF. It was held that, "the compulsory purchase of the undertaking of the petitioner company by the Board without taking over the employees did amount to transfer of the ownership or management of the undertaking from one employer to another. The transfer contemplated by Section 25-FF is of the undertaking, not of its employees necessarily".[2] Therefore, the workmen were entitled to retrenchment compensation as provided in Section 25-FF of this Act. In this case it cannot be said that the undertaking was closed down and, therefore, Section 25-FF did not apply.[3]

In *Workmen of Subong Tea Estate* v. *Subong Tea Estate*[4] the vendee took possession of the Tea gardens. They also assumed control and management of the Tea gardens before the sale deed was executed. When sanction of the Reserve Bank of India was received the sale-deed was executed. Before execution of the sale deed, the vendor company retrenched some of the workmen. The retrenched workmen accepted retrenchment compensation but immediately protested that the retrenchment was illegal. It was also pleaded that had they not accepted the compensation, they would not have been paid their salary for the last month. The Supreme Court in special leave held that retrenchment was not in consequence of transfer, but a retrenchment effected after the transfer was made. The retrenchment was made by the transferee who in the meantime became employer of the retrenched workmen by virtue of his assuming control and management of the Tea gardens. Therefore, the provisions of Section 25-FF were not attracted. The plea that retrenched workmen were estopped from challenging the validity of retrenchment because they had accepted the retrenchment compensation is untenable because such technical pleas are generally not entertained in Industrial adjudications.[5]

It was held in *Gurushan Thappa* v. *Abdul Khuddus*[6] by the Supreme Court that when a Government undertaking was taken over by the company as a going concern the employees working in the undertaking were also taken over and since, in law, the company has to be treated as an entity distinct and separate from the Government, the employees as a result of transfer of the undertaking became employees of the company and ceased to be employees of the Government.

It was held in *Workmen of Karnataka Agro Proteins Ltd.* v. *Karnataka Agro Proteins Ltd. and others*[7] that in case of transfer of ownership or management of an

1. *U.P. Electric Supply Co. Ltd.* v. *R.K. Shukla*, AIR 1970 SC 237.
2. *A.C.E.S. Corpn.* v. *Workmen*, AIR 1971 P & H 274.
3. *Ibid.*
4. (1964) 1 LLJ 333 (SC).
5. *Ibid.*
6. AIR 1969 SC 744.
7. (1992) 1 Lab LJ 712 (Karn).

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undertaking, the employees can only make a claim for compensation against their employers. No claim can be made against the transferee concern. The Court cannot give direction to transferee company to absorb and continue in service the workmen.

Section 25-FFA. Sixty days' notice to be given of intention to close down any undertaking.—(1) An employer who intends to close down an undertaking shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking :

Provided that nothing in this section shall apply to—

(a) an undertaking in which—

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the preceding twelve months ;

(b) an undertaking set-up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

(2) Notwithstanding anything contained in sub-section (1), the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order direct that provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

Section 25-FFF. Compensation to workmen in case of closing down of undertakings.—Section 25-FFF provides for compensation to workmen in case of closure of an undertaking. The purpose of this section is to create a sense of security in a worker that if he sticks to his work, he will not be thrown out of his employment in case of closing down of the undertaking. Therefore, provision is made for payment of compensation in case of closure of an undertaking.[1]

According to sub-section (1) of Section 25-FFF where an undertaking is closed down for any reason every workman is entitled to :

(1)(i) notice ; and (ii) compensation, provided that such workman has been in continuous service for not less than one year in that undertaking immediately before the closure. The right of a workman under this sub-section is subject to the provisions of sub-section (2) ; and

(2) when any compensation under this section is payable it shall be paid in accordance with the provisions of Section 25-F as if the workmen had been retrenched. Where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under Clause (b) of Section 25-F shall not exceed his average pay for three months. If the closure was on account of unavoidable circumstances beyond the control of the employer and the workman fulfils the conditions under Section 25-FFF, the workman shall be entitled to compensation, which shall be determined by reference to Section 25-F (b) of the Act.

Explanation.—An undertaking which is closed down by reason merely of financial difficulties (including financial loss) ; or accumulation of undisposed of stocks ; or the expiry of the period of the lease or licence granted to it, or in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on, .

shall not be deemed to have been closed down on account of unavoidable

1. *See* Misra S.N., "Closing Down of Business and Legislative Protection to Workmen (1973) 2 SCC 5

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circumstances beyond the control of the employer within the meaning of the proviso to this sub-section.

Sub-section (1-A) of this section provides as follows :—

(1A) Notwithstanding anything contained in sub-section (1), where an undertaking engaged in mining operation is closed down by reason merely of exhaustion of the minerals in the area in which such operations are carried on, no workman referred to in that sub-section shall be entitled to any notice or compensation in accordance with the provisions of Section 25-F, if—

(a) the employer, provides the workman with alternative employment with effect from the date of closure at the same remuneration as he was entitled to receive, and on the same terms and conditions of service as were applicable to him, immediately before the closure ;

(b) the service of the workman has not been interrupted by such alternative employment ; and

(c) the employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment.

According to sub-section (1-B) of this section, for the purposes of sub-sections (1) and (1-A), the expression "minerals" and "mining operations" shall have the meanings respectively assigned to them in Clauses (a) and (b) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957.

According to sub-section (2) where any undertaking set up for the construction of buildings, bridges, roads, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set up, no workman employed therein shall be entitled to any compensation under Clause (b) of Section 25-F, but if the construction work is not so completed within two years he shall be entitled to notice and compensation under that section for every completed year of continuous service, or any part thereof in excess of six months.

The closure must be real[1] or a closure in fact whether *bona fide* or *mala fide*.[2] A closure must be genuine and *bona fide* in the sense that it should be a closure in fact and not merely a pretension of closing the place of business.[3] The motive of closure is an immaterial consideration.[4] What is necessary is that the closure must be an effective one.[5] An employer has undoubtedly a right to carry on his trade or business or to discontinue it, but if he desires to discontinue, he must indeed and in fact discontinue it, he must not pretend to discontinue or close down the place of business temporarily for *mala fide* reasons such as victimisation of the workmen and coercing them to accept his own terms.[6] The use of expression "for any reasons whatsoever" implies that the reasons of closure are immaterial. But the closure must be on account of unavoidable circumstances beyond the control of the employer.

In *The Management of Standard Motors Products of India Ltd.* v. *Shri A.*

1. *Mackenzie Ltd. Madras* v. *Labour Court*, (1950) 1 LLJ 334 (Mad).
2. *Tea District Labour Court Association* v. *Ex-employees of Tea District Labour Association*, AIR 1960 SC 815.
3. *Kalinga Tubes Ltd.* v. *Their Workmen*, AIR 1969 SC 90.
4. *Tatanagar Foundary* v. *Their Workmen*, AIR 1970 SC 1960.
5. *Ibid.*
6. *Jay Bharat Ale Works* v. *State of Madras*, (1954) 1 LLJ 286.

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Parthasarathy and another,[1] the workmen of the factory went on strike and continued the strike even after the order prohibiting the strike was issued by the Government. Therefore the factory was closed in May 1970. Pursuant to a settlement the factory resumed work as a new unit in January 1971. Some of the workmen filed petition under Section 33-C(2) claiming closure compensation under Section 25-FFF of the Industrial Disputes Act, 1947. It was held that if the workmen had worked for 240 days during the period of 12 calendar months preceding the date of closure excluding the period of illegal strike, the workmen would be entitled to closure compensation in view of the provisions contained in Section 25-B(2). In such cases the workmen were to be held to be in continuous service for a period of one year and Sundays and other paid holidays were to be included for calculating 240 days.

In *Workmen* v. *Straw Board Mfg. Co.*,[2] the Straw Board Manufacturing Company owned two units known as the Straw Board Mill and the Regmal Mill. These two units were situated very close to each other with only a railway line intervening. Each has a factory registered separately under the Factories Act but one balance sheet and account was prepared for the company as a whole. The Straw Board Mill was closed on account of shortage of raw materials and the services of the workmen were terminated. It was held that the two units did not form part of one establishment and therefore the closure of Straw Board Mill was legitimate. The following principles were laid down in this case :—

(1) The most important aspect relating to closure is whether one unit has such componental relation that closing of one must lead to the closing of the other or the one cannot reasonably exist without the other. That the other unit is capable of functioning in isolation is of very material import in the case of closure.

(2) The workmen cannot question the motive of the closure, once closure has taken place in fact. The matter may be different if under the guise of closure the establishment is being carried on in some shape or form at a different place and the closure is only a ruse or pretence.

(3) An employer may close his establishment by stages.

(4) A claim under this section can be made not only under Section 33-C of the Act but even an Industrial Tribunal may, in a reference, grant appropriate relief.

Proviso to this sub-section makes provision for payment of reduced compensation if it is proved that the undertaking was closed down on account of unavoidable circumstances beyond the control of the employer.[3] A closure due to *vis major* or act of God or enemy act or an act of State are the circumstances beyond the control of the employer.[4] The closure of a bank under winding-up order of the High Court was held on account of unavoidable circumstances beyond the control of the employer.[5]

In *Prakash Cotton Mills Pvt. Ltd.* v. *The Rashtriya Mill Mazdoor Sangh*,[6] due to detention orders passed by the Central Excise authorities detaining cotton fabrics, cotton yarn etc., there was a stoppage in the working of the Mills. The union claimed closure compensation which was resisted by the employer on the ground that the closure was beyond the control of the Management and in accordance with the standing order. It was

1. (1986) 1 Lab LJ 34 (SC).
2. AIR 1974 SC 1132.
3. *Hathising Manufacturing Co.* v. *Union of India*, (1960) 2 LLJ 1 (SC).
4. *Bhattacharjee Rubber Works (Private) Ltd.* v. *Bhattacharjee Rubber Works Workers' Union*, (1960) 2 LLJ 198 (Cal).
5. *Palai Central Bank Employees' Union* v. *Palai Central Bank Ltd.*, (1960) 1 LLJ 533 (Ker).
6. (1987) 1 Lab LJ 97 (SC).

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held that the Management is liable to pay closure compensation and the union is entitled to make an application to claim closure compensation. But 'badli workmen' have no right to claim such compensation.

In *Shri Rameshwar Dass and others* v. *State of Haryana and others*,[1] it was held that usual industrial unrest leading to strikes and lock-outs are unavoidable circumstances beyond the control of the employer within the meaning of Section 25-FFF(1) of the Act. But where there has been continuous industrial unrest marked by strikes and lock-outs and marred by acts of violence and lawlessness over a number of years, the question whether closure in such circumstances was because of unavoidable circumstances beyond the control of employer has to be decided in a properly raised industrial dispute.

Non-compliance either with clause (a) or (b) of Section 25-F will render a retrenchment order invalid, void and inoperative. The workmen whose suspension and retrenchment orders are found to be illegal are, on the setting aside of those orders, entitled to be treated as continuing in service.[2] Therefore in case of closure of business such workmen are entitled not only to the salary from the date of retrenchment or suspension to the date of closure of business but also for retrenchment compensation under Section 25-FFF.

In *A.S. Production Agencies* v. *Ind. Tribunal Haryana*,[3] painting section of a factory was closed down. A notice was served on two workmen working in that section stating that they are retrenched and also simultaneously stating that the action is taken under Section 25-FFF. It was held that there was no closure of an undertaking as contemplated by Section 25-FFF. The painting section could not be recognised as a sub-section eligible for being styled as a part of the undertaking. If such mini classification is permitted it would enable the employer to flout Section 25-F with immunity. An employer may stop certain work which was part of an undertaking but which could not be classified as an independent undertaking, the stoppage of work in this context would not amount to closure of the undertaking. This was a case of retrenchment and as conditions precedent were not complied with, the retrenchment was invalid and the relief of reinstatement with full back wages was amply deserved.

In *G. Govinda Rajulu* v. *The A.P. State Construction Corporation Ltd., and another*[4] the Supreme Court held that the employees whose services were terminated due to the closure of the Andhra Pradesh State Construction Corporation Ltd., should be continued in service on the same terms and conditions either in the Government Departments or in the Government Corporations.

In *Isha Steel Treatment, Bomaby* v. *Association of Engineering Workers Bombay and another*,[5] a factory for the purpose of carrying on metal processes with the help of 32 workmen was established. Another factory was established after 12 years for carrying on the same kind of business employing about 75 workmen. Although the distance between the two factories was about 200 yards but both were maintaining separate stores, accounts and obtaining separate licences. Separate muster rolls was also maintained in respect of workmen of each of the two factories and workmen were not inter-transferable between the two factories. The first factory was closed due to lack of production and indiscipline on the part of workmen and workmen were paid closure compensation. The workmen raised a dispute demanding reinstatement. One of the contentions raised was that the principle of "Last come first go" as laid down in Section

1. (1987) 1 Lab LJ 514 (SC).
2. *Workmen, K.L. & S. Industries* v. *Presiding Officer*, AIR 1971 P & H 427.
3. AIR 1979 SC 170.
4. (1988) 1 Lab LJ 328 (SC).
5. (1987) 1 Lab LJ 427 (SC).

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25-G of the Act was not followed. The Provident Fund Accounts of the employees and the Employees State Insurance Accounts of the two factories had common numbers with the authorities concerned and that settlements containing similar terms had been entered into between the Management and the workmen of the two factories. It was held that these are not sufficient factors to hold that the factories were one and the same notwithstanding the fact that the nature of business carried on by them was the same. Therefore the conclusion of the Tribunal that the closure of the first factory was *bona fide*, that it did not have any functional integrality with the second factory and that there was no victimisation of workmen are correct. Further in order to effect closure of business it is not necessary that management should close down all the branches of its business.

In cases falling under Section 25-FFF payment of retrenchment compensation is not a condition precedent. Retrenchment compensation has not to be paid along with the discharge notice.[1]

The word undertaking as used in Section 25-FFF seems to have been used in its ordinary sense connoting thereby any work, enterprise, project or business undertaking.[2] It is intended not only to cover the entire industry or business of the employer but closure of even part of the business or activities of the employer would be covered by this section and thus would incur retrenchment compensation.[3]

Constitutionality of Section 25-FFF.—Section 25-FFF was challenged for being in violation of Articles 14 and 19(1)(g) of the Constitution. This section equally applies to all industries falling within a group and the classification made is rational to the object of the enactment. The classification is neither arbitrary nor unreasonable and hence there is no infringement of Article 14. So far as the violation of Article 19(1)(g) is concerned, this Article itself envisages certain restriction which can be imposed in the interest of general public. The employer has a fundamental right to carry on or to close down his business particularly when such business does not yield any profit, but reasonable restriction in the interest of general public can still be imposed upon his right to close down business, and a legislation under Section 25-FFF cannot be held unconstitutional on that account.[4]

In *Kalinga Tubes Ltd.* v. *Their Workmen*,[5] the Kalinga Tubes Ltd. carried on the business of manufacturing and selling iron pipes and poles. Its workmen demanded 20 per cent of their annual salary or wages for the year 1966-67 as bonus. The management offered only 4 per cent. The workmen raised a dispute and the District Labour Officer fixed 2nd October, 1967, for discussion. On October 1, 1967 about 150 workmen assembled after 2 p.m. at the gates of the Administrative Building in which about 40 to 47 members of the staff were present. They were not allowed to leave the building till 5 a.m. of 2nd October, 1967. Factory remained closed on 2nd October on account of Mahatma Gandhi birthday. On the morning of 3rd October, 1967, the management offered to pay wages for one month in lieu of notice and reduced compensation under the proviso to sub-section (1) of Section 25-FFF of this Act. The reference under the Industrial Disputes Act was made by the Orissa Government for adjudicating whether the appellant company had declared lock-out by means of the notice or it was closure. The Supreme Court held it to be the case of closure for any reason whatsoever and observed as follows :—

(1) The closure of an undertaking cannot be limited or restricted only to

1. *Sunder Singh* v. *Beas Construction Board*, AIR 1979 P & H 1.
2. *Management Hindustran Steel* v. *Workmen*, AIR 1973 SC 878.
3. *Indian Metal and Mettalurgical Corporation* v. *Industrial Tribunal*, (1955) 1 LLJ 364 (Mad).
4. *Hathi Singh Manufacturing Co. Ltd.* v. *Union of India*, (1960) 2 LLJ 1 (SC).
5. AIR 1969 SC 90.

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financial, economic or other considerations of like nature. The closure has to be genuine and *bona fide* in the sense that it should be a closure in fact and not a mere pretence of the closure.[1] It was not open to go into the question as to the notice of the closure. The expression *bona fide* did not refer to the motive behind the closure but to the fact of the closure.[2] The essence of the matter is not the reason but the factum of closure by whatever reasons motivated.

(2) The Court rejected the contention that the company must be wound up or there should have been a transfer of the machinery or the factory before it could be said that the undertaking had been closed down.

(3) The *gherao* of the members of the Administrative Staff and the apprehension of danger to the personal safety which were likely to result, in deterioration of the relations between the management and the workmen justify the decision to close down the factory. The company was a profitable and going concern. These facts show that the management was faced with a situation in which it could well take a decision to close down the undertaking.

(4) Compensation payable in case of closure of an undertaking due to unavoidable circumstances beyond the control of the employer is different than the closure of an undertaking for any reasons whatsoever. In the present case the closure was not due to any circumstances beyond the control of the employer but compensation would be payable as if the undertaking was closed down "for any reason whatsoever within Section 25-FFF(1) of the Act."

(5) The explanation appearing in the proviso gives some indication of the anxiety of the legislature to expressly rule-out certain contingencies which ordinarily could have been pleaded by the employer as unavoidable circumstances beyond his control. In the normal working of business of a commercial undertaking financial losses or accumulation of undisposed stocks and the expiry of the lease or the licence can ordinarily go a long way in establishing that it has virtually become impossible to carry on the business.

Section 25-G. Procedure for retrenchment.—The well recognised principle of retrenchment in industrial law is 'first come last go' and 'last come first go'. This principle has been incorporated in Section 25-G of the Act. The procedural protection provided under this section can be claimed by a workman on the fulfilment of the following conditions, namely :—

(1) The workman must be a workman within the meaning of Section 2(S) of the Act ;

(2) The workman should be an Indian citizen ;

(3) The workman should be employed in an establishment which is an industry within the meaning of Section 2(J) of the Act ;

(4) The workman should belong to a particular category of workmen in the industrial establishment ; and

(5) There should be no agreement contrary to the principle of 'last come first go' between the employer and workman. Any provision in the standing orders to the above effect shall be deemed to be agreement for the purposes of this section.

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1. *See* also *Tea District Labour Association, Calcutta* v. *Ex-employees of Tea District Labour Association*, AIR 1960 SC 815.
2. *See* also *Indian Hume Pipe Company* v. *Their Workmen*, AIR 1968 SC 1002.

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For the application of Section 25-G all the above five conditions must be simultaneously complied with. If these conditions are fulfilled the principle of "last come first go" shall be ordinarily adhered to by the employer. The use of the word "ordinarily" connotes that the above procedure can be departed from where circumstances specially applicable to the industry in question so demand. But in case of any departure from the established principle of retrenchment, the reasons therefor must be recorded by the employer. Thus any departure from the above principle is possible in two cases, namely :—

(1) by an agreement to the contrary between the workman and the employer ; and

(2) for any other reasons to be recorded by the employer.

It is noteworthy that the above principle has to be applied with respect to different categories of workmen employed in an industrial establishment and not to the whole of the establishment. The well recognised principle of retrenchment is that management should start with the latest recruit and progressively retrench employees higher up in the list of seniority.[1] The management in matter of retrenchment must act fairly. The management can *bona fide* retain the employees possessing special qualifications whose services are necessary in the interest of business, irrespective of their seniority.[2] Similarly, even a senior employee can be retrenched against the principle if there is sufficient recorded evidence of his in efficiency or irregularity.[3] The rule is not immutable but any departure therefrom must be justified by sound, and valid reasons.[4] The employer is required to record the reason in case of any departure from the rules, so that the Tribunal can determine the relevance of any such reasons. If the departure, in the opinion of the Tribunal, is not based on sound and satisfactory reasons, the action of the management may be treated *mala fide* or amounting to unfair labour practice and victimization.[5] But the mere departure from the rule cannot be assumed to be actuated with ulterior motive.[6]

In *Brohan Kumar* v. *Barauni Oil Refineries*,[7] it was held that "in case of retrenchment of employee the employer has to follow the principle of "last come first go" in the absence of any agreement between the employer and the workmen. The retrenchment is to be effected on the basis of seniority of employees working category-wise and not on the basis of seniority on a particular job on the date of award, and any departure from the ordinary law embodied in Section 25-G cannot be enforced by the employer".

The principle of 'last come first go' applies only in case of retrenchment. If there has been a genuine closure the question of its application does not arise.[8]

Relief in case of unjustified retrenchment.—A workman who is improperly retrenched has a right to reinstatement even if some one has been engaged in his place and an order for payment of remuneration for the period the employee remained unemployed may be made by the Tribunal.[9]

In *Workmen of Sudder Workshop* v. *The Management*,[10] seven workmen were

1. *Om Oil and Oilseeds Exchange Ltd.* v. *Their Workmen*, (1969) 2 LLJ 342 (SC).
2. *Ibid.*
3. *Swadeshmitran Ltd.* v. *Their Workmen*, (1960) 1 LLJ 504 (SC).
4. *Ibid.*
5. *Ibid.*
6. *Om Oil and Oilseeds Exchange Ltd.* v. *Their Workmen*, (1969) 2 LLJ 342 (SC).
7. AIR 1971 Pat 174.
8. *Isha Steel Treatment Bombay* v. *Association of Engineering Workers, Bombay*, (1987) 1 Lab LJ 427 (SC).
9. *Brohan Kumar* v. *Barauni Oil Refineries*. AIR 1971 Pat 174.
10. (1980) 2 LLJ 124 (SC).

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retrenched and the rule of 'last come first go' was not observed. It was held by the High Court that it cannot be said that the management's selection of persons to be retrenched leaving the juniormost in some category was justified and the reasons adduced before the High Court for deviating from the principle of "last come first go" cannot be accepted in the absence of the reason being not recorded at the time of retrenchment. This view was upheld by the Supreme Court and the order of reinstatement of these workmen was held to be a valid order.

Industrial establishment.—'Industrial establishment' for the purpose of this section has not been defined. But the test to determine the unity of establishment in case of lay-off discussed earlier in this chapter shall apply in the case of retrenchment also.

Jurisdiction of the High Court.—The determination of the question whether a department or a branch of an establishment is by itself an "industrial establishment" is a mixed question of law and fact both, because its determination involves the application of the test laid down in Section 25-G and correct inference to be drawn from the facts proved and such a question is within the writ jurisdiction of the High Court under Article 226 of the Constitution.[1]

Section 25-H. Re-employment of retrenched workmen.—Section 25-H of the Act is based on known principle that when a workman has been retrenched by employer on the ground of surplus staff, such workman should first be given an opportunity to join service whenever an occasion to employ another hand arises. This section imposes a statutory obligation on the employer to give opportunity to the retrenched employees to offer themselves for re-employment. In order to claim preference in employment under this section a workman must satisfy the following conditions :

(1) he should have been retrenched prior to re-employment ;
(2) he should be a citizen of India ;
(3) he should offer himself for re-employment in response to the notice by the employer ;
(4) he should have been retrenched from the same category of service in the industrial establishment in which the re-employment is proposed.

Only a 'retrenched' workman can claim benefit under Section 25-H. A dismissed, discharged or a superannuated workman has no claim for preferential re-employment. When notice is given to a workman and he fails to offer himself for re-employment, he will be disentitled from claiming the benefit under this section. An assistant store-keeper doing the job of a clerical nature was retrenched. After retrenchment, three new hands were employed by the company in the cadre of the clerks. The Industrial Tribunal held that the retrenched store-keeper was wrongfully kept out of employment after the employment of new clerks. The Supreme Court in special appeal held that, "the retrenched workman should be given an opportunity of re-employment whenever the employer has to employ fresh hands. The principle is not only incorporated in Section 25-H of the Act but is of general application in industrial adjudication, as it is based on fair play and justice".[2] The right of retrenched workman to re-employment is not affected by the permission or approval of the Tribunal under Section 33 to discharge such workman by way of retrenchment.[3]

It was held in *Delta Wire Pvt. Ltd.* v. *General Labour Union (Reg. Flag) and another*[4] that after having been retrenched and paid the statutory compensation the only right available to a workman by reason of having been previously employed is the one

1. *Indian Cable Co.* v. *Its Workmen*, (1962) 1 LLJ 409 (SC).
2. *Cawnpur Tannery Ltd.* v. *S. Guha*, (1961) 1 LLJ 110 (SC).
3. *M.D. Thakur* v. *Labour Appellate Tribunal*, (1956) 1 LLJ 246 (Bom).
4. (1995) 2 Lab LJ 287 (Bom).

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conferred by Section 25-H of the Industrial Disputes Act. Such a workman has a preference in re-employment but he can not after re-employment, claim the same conditions of service as enjoyed by him prior to retrenchment.

Section 25-J. Effect of Laws inconsistent with this Chapter.—(1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including the provisions of Standing Order. In other words, in case of conflict between the provisions of any Standing Order and Chapter V-A the provisions of Chapter V-A will override the provisions of the Standing Orders to the extent of inconsistency. Sub-section (1) is again made subject to the proviso.

Proviso.—Where under the provisions of (a) any other Act or rules ; (b) orders or notifications issued under such Act or rules ; (c) Standing Orders ; (d) any award ; (e) contract of service, or (f) otherwise, a workman is entitled to such benefits as are more favourable to him, he shall continue to be entitled to the more favouable benefits ; notwithstanding that he receives benefits in respect of other matters under this Act.

The applicability of Section 25-J is confined to Chapter V-A only and it cannot be extended to matters not falling within that Chapter.[1] Thus the provisions of any other inconsistent law will have the effect overriding the provisions of Chapter V-A if and in so far as they are comparatively favourable to a workman. In *Devidayal Nanak Sharma* v. *State Industrial Court*,[2] a workman was removed from his service and the management offered him one month's salary in lieu of notice. The Standing Orders of the said concern did not provide for a show cause notice against the termination of service of a workman. Compensation for termination was awarded by the Tribunal. It was held by the Bombay High Court that the employer was entitled to rely on the Standing Orders because Standing Orders are subject to the provisions of Chapter V-A as provided by Section 25-J of the Act.

It was held in *Jaswant Singh* v. *Union of India*,[3] that the work charged employees possess a unique right as industrial employees since by reason of Section 25-J(1) the provisions of Chapter V-A have effect notwithstanding anything contained in any other law including Standing Orders made under Industrial Employment Standing Orders Act, 1946.

Sub-section (2).—This sub-section provides that the provisions of Chapter V-A shall not affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter. It means in so far as provision has been made in this Chapter about rights and liabilities of employer or workmen they will be determined in accordance with these provisions.[4] In so far as no provision relating to retrenchment or lay-off is made in this Chapter, provisions of any other law in force in any any State shall determine the dispute relating to the rights and liabilities of the employer and workmen provided that such law is not inconsistent with the provisions of Chapter V-A.[5]

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1. *Sri Brindavan Hotel* v. *Conciliation Officer*, AIR 1978 AP 386.
2. (1961) 1 LLJ 167 (Bom).
3. (1979) 2 LLJ 371 (SC).
4. *Sawatram Ramprasad Mills Co. Ltd.* v. *Baliram Ukandaji*, (1966) 1 LLJ 41 (SC).
5. *Narayan Agra Sugar Mills Ltd.* v. *Mill Mazdoor Sabha*, (1954) 1 LLJ 678 (LAT).

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CHAPTER IX
SPECIAL PROVISION RELATING TO LAY-OFF, RETRENCHMENT AND CLOSURE IN CERTAIN ESTABLISHMENTS

By an amendment in the year 1976 this Chapter has been added as Chapter V-B to the Industrial Disputes Act, 1947.

Section 25-K. Application of Chapter V-B.—(1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.

(2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final.

Section 25-L. Definitions.—For the purposes of this Chapter,—

(a) "industrial establishment" means—

(i) a factory as defined in clause (m) of Section 2 of the Factories Act, 1948 ;

(ii) a mine as defined in clause (j) of sub-section (1) of Section 2 of the Mines Act, 1952 ; or

(iii) a plantation as defined in clause (f) of Section 2 of the Plantations Labour Act, 1951 ;

(b) notwithstanding anything contained in sub-clause (ii) of clause (a) of Section 2 :

(i) in relation to any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or

(ii) in relation to any corporation [not being a corporation referred to in sub-clause (ii) of clause (a) of Section 2] established by or under any law made by Parliament,

the Central Government shall be the appropriate Government.

Section 25-M. Prohibition of lay-off.—(1) No workman (other than a *badli* workman or a casual workman) whose name is borne on the muster rolls of an industrial establishment to which this Chapter applies shall be laid off by employer except with the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the official Gazette (hereinafter in this section referred to as the specified authority), obtained on an application made in this behalf, unless such lay-off is due to shortage of power or to natural calamity, and in case of a mine such lay off is due also to fire, flood, excess of inflammable gas or explosion.

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reason for the intended lay-off and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where the workmen (other than *badli* workmen or casual workmen) of an

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industrial establishment being a mine, have been laid off under sub-section (1) for reasons of fire, flood or excess of inflammable gas or explosion, the employer in relation to such establishment, shall within a period of 30 days from the date of commencement of such lay-off apply in the prescribed manner, to the appropriate Government or the specified authority for permission to continue the lay-off.

(4) Where an application for permission under sub-section (1) or sub-section (3) has been made, the appropriate Government or the specified authority, after making such inquiry as it thinks fit, and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the person interested in such lay-off, may having heard to the genuineness and adequacy of the reasons for such lay-off, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant, such permission and a copy of such order shall be communicated to the employer and the workmen.

(5) Where an application for permission under sub-section (1) or sub-section (3) has been made and the appropriate Government or the specified authority does not communicate the order granting or refusing to grant permission to the employer within a period of 60 days from the date on which such application is made the permission applied for shall be deemed to have been granted on the expiry of the said period of 60 days.

(6) An order of the appropriate Government or the specified authority granting or refusing to grant permission, shall, subject to the provisions of sub-section (7) be final and binding on all the parties concerned and shall remain in force for one year from the date of such order.

(7) The appropriate Government or the specified authority, may either on its own motion or on the application made by the employer or any workmen, review its order granting or refusing to grant permission under sub-section (4) or refer the matter or, as the case may be, cause it to be referred to a Tribunal for adjudication :

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of 30 days from the date of such reference.

(8) Where no application for permission under sub-section (3) is made, or where no application for permission under sub-section (3) is made within the period specified therein, or where the permission for any lay-off has been refused, such lay-off shall be deemed to be illegal from the date on which the workmen had been laid-off and the workmen shall be entitled to all the benefits under any law for the time being in force as if they had not been laid-off.

(9) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order, direct, that the provisions of sub-section (1), or, as the case may be, sub-section (3) shall not apply in relation to such establishment for such period as may be specified in the order.

(10) The provisions of Section 25-C (other than the second proviso thereto) shall apply to cases of lay-off referred to in this section.

Explanation.—For the purposes of this section, a workman shall not be deemed to be laid-off by any employer if such employer offers any alternative employment (which in the opinion of the employer does not call for any special skill or previous experience and can be done by the workman) in the same establishment from which he has been laid-off or in any other establishment belonging to the same employer, situate in the same town or village, or situate within such distance from the establishment, to

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which he belongs that the transfer will not involve undue hardship to the workman having regard to the facts and circumstances of his case, provided that the wages which would normally have been paid to the workman are offered for the alternative appointment also.

Section 25-M makes it clear that no workman whose name is borne on the muster rolls of his employer shall be laid off without previous permission of such authority as may be specified by the appropriate Government unless such lay-off is due to shortage of power or natural calamity and in case of a mine it is due to fire, flood etc.[1]

In *Papnasam Labour Union* v. *Madura Coats Ltd. and another*[2] the constitutional validity of Section 25-M was challenged on the ground that this section as amended by Amendment Act of 1976 imposed unreasonable restrictions in so far as it required prior permission to be obtained to effect lay-off and as such it was *ultra vires* and void. The Supreme Court considered a number of its earlier decisions relevant in deciding the question of reasonableness of the restrictions imposed by a statute on the fundamental right guaranteed by Article 19 of the Constitution and held Section 25- M as constitutionally valid. It was held that the object of Section 25-M is to prevent avoidable hardship to the employees resulting from lay-off and maintain higher production and productivity by preserving industrial peace and harmony. These considerations coupled with the basic idea underlying the provisions of the Industrial Disputes Act, namely, settlement of industrial disputes and promotion of industrial peace, give a sufficient indication of the factors which are to be kept in mind in granting or refusing permission to lay-off under Section 25-M(2). It was further pointed out that the legislature has taken care in exempting the need for prior permission for lay-off in Section 25-M if such lay-off is necessitated on account of power failure or natural calamities because such reasons being grave, sudden and explicit, no further scrutiny is called for. There may be various other contingencies justifying an immediate action of lay-off but then the legislature in its wisdom has thought it desirable in the greater public interest that decision to lay-off should not be taken by the employer on its own assessment with immediate effect but the employer must seek approval from the concerned authority which is reasonably expected to be alive to the problems associated with the concerned industry and other relevant factors, so that on scrutiny of the reasons pleaded for permitting lay-off, such authority may arrive at a just and proper decision in the matter of according or refusing permission to lay-off. Therefore in the greater public interest for maintaining industrial peace and harmony and to prevent unemployment without just cause, the restriction imposed under sub-section (2) of Section 25-M cannot be held to be arbitrary, unreasonable or far in excess of the need for which such restriction has been sought to be imposed.[3]

In *Ashok Kumar Jain and others* v. *State of Bihar and others*,[4] the appellants are senior officials of Rohtas Industries Ltd. The case of the company is that due to chronic shortage of power supply the productive activities of the company suffered immensely. The company failed to pay electric bills and the Electricity Board disconnected electric connection to the Company's Factories and establishments for which the company suffered a serious setback. The company resorted to lay-off of its workers without obtaining prior permission of the authority concerned. The Superintendent Labour made a complaint before the Chief-Judicial Magistrate for laying-off workman in violation of Section 25-M *i.e.*, without obtaining prior permission. A petition was moved under

1. *Rashtriya Maharashtra Elektrosmelt Kamgar Sangh* v. *K.B. Satpute, Assistant Commissioner of Labour*, (1984) 2 LLJ 242 (Bombay).
2. AIR 1995 SC 2200.
3. *Papnasam Labour Union* v. *Madura Coats Ltd.*, AIR 1995 SC 2200.
4. (1995) 2 Lab LJ 685 (SC).

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Article 226 in the High Court for quashing the prosecution by contending that Section 25-M in so far as it required permission to lay-off was *ultra-vires* the constitution. The High Court of Patna held that Section 25-M was *ultra-vires* the constitution and also directed that the Magistrate would hold inquiry under Section 202 Cr. P. Code for ascertaining whether the appellants could be held to be employer. Against the above decision of the High Court special leave petition was moved before the Supreme Court. Following *Madura Coats Ltd. case*[1], section 25-M was held constitutionally valid. Prosecution was also held maintainable but in view of the special facts of the case, namely that lay-off had to be resorted for compulsive circumstances beyond the control of the company and the Management the inquiry as directed by the High Court was not to be made. It was also held that criminal cases need not be pursued. This was held not only within the ambit of Section 482 Cr. P. Code but in the special facts of the case will also secure the ends of justice.

Section 25-N. Conditions precedent to retrenchment of workmen.—(1) No workman employed in any industrial establishment to which this chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer, until :

(a) the workman has been given three months notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice wages for the notice ; and

(b) the prior permission of the appropriate Government or such authority as may be specified by the Government by the notification in the Official Gazette has been obtained on an application made in this behalf.

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workman concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workman concerned and the persons interested in such retrenchment, may having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order, and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where an application for permission has been made under sub-section (1) and the appropriate Government or the specified authority does not communicate the order granting or refusing to grant permission to the employer within a period of 60 days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of 60 days.

(5) An order of the appropriate Government or the specified authority, granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all parties concerned and shall remain in force for one year from the date of such order.

(6) The appropriate Government or the specified authority may, either on its own motion or on the application made by the employer, or any other workmen, review its order, granting or refusing to grant permission under sub-section (3) or refer the matter or, as the case may be, cause it to be referred to a Tribunal for adjudication :

Provided that where a reference has been made to a Tribunal under this

1. (1995) 1 SCC 501

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sub-section it shall pass an award within a period of 30 days from the date of such reference.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

(8) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order direct that the provisions of sub-section (1) shall not apply in relation to such establishment for such period as may be specified in the order.

(9) Where permission for retrenchment has been granted under sub-section (3) or where permission for retrenchment is deemed to be granted under sub-section (4), every workman who is employed in that establishment immediately before the date of application for permission under this section shall be entitled to receive, at the time of retrenchment, compensation which shall be equivalent to fifteen day's average pay for every completed year of continuous service or any part thereof in excess of six months.

In was held in *State Transport Accounts Association* v. *Orissa State Road Transport Corporation*,[1] that the respondent Corporation is an industrial undertaking within the meaning of Section 25L. The Corporation has its workshops for repairs and servicing the transport buses, plants for retreading tyres, printing press to produce ticket books and other materials, such as, forms and registers to be maintained in the offices, without these units, the transport business cannot be carried on. The factories may be located in different stations and zone but they constitute an integrated whole and form specific units of the Corporation so as to make it an industrial undertaking and therefore, the orders of the retrenchment without compliance of the mandatory provisions of Section 25-N are illegal.

In *Workmen of Meenakshi Mills Ltd. etc.* v. *Meenakshi Mills Ltd. and another*,[2] the Supreme Court has held Section 25-N of the Act as constitutionally valid on the ground that the restrictions imposed on the right of employer to retrench workmen is in the interest of general public. It does not infringe Article 19(1)(g) of the Constitution and duty to pass a speaking order and affording opportunity to the parties concerned is sufficient safeguard against arbitrary action. Authority is not invested with judicial power while functioning under sub-section (2) of Section 25-N and hence no appeal lies to Supreme Court against an order passed under sub-section (2) of Section 25-N.

It was further held that an industrial dispute may arise on account of failure on the part of employer to comply with the conditions of Section 25-N. Both workmen and management can raise industrial disputes and move the appropriate Government granting or refusing permission for retrenchment.

In *EID Parry (India) Ltd., Tadepalle* v. *Labour Court, Guntur and others*,[3] there was an agreement between Parry Company and the union of workers of the company. Under the settlement it was agreed that if employees upto 60 are retrenched in accordance with the provisions of the Act and if they do not opt under the revised Voluntary Retirement Scheme the union will not champion their cause. It was held that in view of the above settlement it cannot be said that prior permission of the Government before retrenchment as required under Section 25-N (1)(b) was dispensed

1. (1990) Lab IC 1378 (Orissa).
2. (1992) 2 Lab LJ 294 (SC).
3. (1992) 2 LLJ 580 (A.P.).

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with under the settlement. Therefore retrenchment was illegal from the date notices of retrenchment were given to the retrenched workmen and they shall be entitled to all benefits under any law for the time being in force as if no notice had been given to them.

Section 25-O. Procedure for closing down an undertaking.—(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representative of the workmen in the prescribed manner :

Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for permission has been made under sub-section (1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of sub-section (5) be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on the application made by the employer or any workmen, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a Tribunal for adjudication :

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions in this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of

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application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.

In *S.G. Chemicals and Dyes Trading Employees' Union* v. *S.G. Chemicals and Dyes Trading Limited and another*,[1] the respondent Company was engaged in business of pharmaceuticals etc. and was operating in Bombay through three Divisions situated at different places. The Pharmaceutical, the Dyes, and the Marketing and Sales Divisions situated at Worly, Trombay and Churchgate respectively. The registered officer of the Company was also situated at Churchgate. The Company gave notice to the Government under Section 25-FFA(1) of its intention to close down its Marketing and Sales Division employing 90 workmen at Churchgate. Copies of the said notice were sent to the Commissioner of Labour, Maharashtra and the Union. Pursuant to this notice the Division of Churchgate was closed down and the Company agreed to pay compensation under Section 25-FFF of the Industrial Disputes Act. The Union protested against the termination of the services of the workmen and complained that the closure was contrary to the provisions of Section 25-O of the Industrial Disputes Act and the Company had committed an unfair labour practice under the Maharashtra Recognition of Trade Unions and Prevention of the Unfair Labour Practice Act, 1971. The Union contended that for the purpose of Section 25-O all the workmen working in all the three Divisions of the Company should be taken into consideration as there was functional integrality amongst all the three Divisions. It was held that Section 25-O applies to the closure of an undertaking of an industrial establishment and not to the closure of an industrial establishment. It also does not require that an undertaking of an industrial establishment should also be an 'industrial establishment'. The term undertaking though it occurs in several sections of the Industrial Disputes Act, is not defined anywhere in the Act. Even the new clause (Ka) of Section 2 of the Act defines the expression 'industrial establishment or undertaking' and not the term 'undertaking' simpliciter. It would appear from opening words of clause (Ka) namely, 'Industrial establishment or undertaking' that it means an establishment or undertaking in which any industry is carried on, and that the term 'undertaking' in that definition applies to an industrial undertaking.

It was further pointed out that the expression 'industrial establishment' is defined in the Explanation to Section 25-A in identical terms with Section 25-L. Industrial establishment means among other things a 'factory' as defined in clause (m) of Section 2 of the Factories Act, 1948. In view of this clause 'factory' means "any premises including the precincts thereof" and it does not define it as meaning "any one premises including the precincts thereof". Under this definition it is not required that the industrial establishment must be situate in any one premises only. Secondly premises must be such where manufacturing process is carried on and it is often not possible for all processes which ultimately result in the finished product to be carried out in different buildings situate at different places. Further that a factory can be housed in more than one building is also clear from Section 4 of the Factories Act.[2]

Therefore, 'undertaking' means part of an 'industrial establishment'. Undertaking and industrial establishment taken together constitute one establishment. Section 25-O would apply to the closure of an undertaking provided the condition laid down in Section 25-K is fulfilled. Further undertaking of an industrial establishment need not be a factory. Consequently it was held that the closure of the Churchgate division was illegal as it was in contravention of the provisions of Section 25-O and the workmen whose services were terminated on account of such illegal closure are entitled to receive

1. (1986) I Lab LJ 490 (SC).
2. *Ibid.*

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their full salary.[1]

It was held in *Vazir Glass Works Ltd.* v. *Maharashtra General Kamgar Union & another*,[2] that reference to the Industrial Tribunal for adjudication of the application for permission to close an industrial unit is made under Section 25-O(5) of the Industrial Disputes Act and not under Section 10(1) of the said Act.

Constitutionality of Section 25-O.—In *Excel Wear* v. *Union of India*,[3] it was held that Section 25-O of the Act as a whole and Section 25-R in so far as it relates to the awarding of punishment for infraction of the provisions of Section 25-O are constitutionally bad and invalid for violation of Article 19(1)(g) of the Constitution. Intrinsically no provision of Chapter V-B suggests that the object of carrying on the production can be achieved by the refusal to grant permission..... It is highly unreasonable to achieve the object by compelling the employer not to close down in public interest for maintaining production.

It was further held that it is true that Chapter V-B deals with certain comparatively bigger undertaking and of a few types only. But with all this difference it has not made the law reasonable. It may be a reasonable classification for saving the law from violation of Article 14, but certainly it does not make the restriction reasonable within the meaning of Article 19(6). Similarly, the interest of ancillary industry cannot be protected by compelling an employer to carry on the industry although he is incapacitated to do so. Nobody has got a right to carry on the business if he cannot pay even the minimum wages to the labourer. He must then retire from business. But to tell him to pay and not to retire even if he cannot pay is punishing the matter to an extreme.

In *M/s. Orissa Textile and Steel Ltd.* v. *State of Orissa and others*,[4] the constitutional validity of Section 25-O was challenged on the ground that the 'right to continue business' within the meaning of Article 19(1)(g) includes right to close down the business and the fact that the citizen cannot exercise this right in as much as the permission of the State Government is required under Section 25-O before closing down the business, infringes the right guaranteed under Article 19(1)(g). This contention is based on the decision of the Supreme Court in *Excel Wear etc.* v. *Union of India*,[5] but the infermities pointed out in this case were rectified by amendment of the year 1982[6] It was held that the decision of the Supreme Court in *Workmen of Meenakshi Mills Ltd.* v. *Meenakshi Mills Ltd.*[7] would equally apply to the provisions of Section 25-O as amended by the Act 46 of 1982. The right to close a business is an integral part of the fundamental right to carry on business and is guaranteed by Article 19(1)(g) of the Constitution. The closure of any industrial undertaking is likely to have adverse impact on the interest of the working class and therefore the legislature enacted the provisions of Section 25-O to consider the interest of the workers employed in a large industrial undertaking. The interest of labour has not to be ignored and therefore a balance has been struck by prescribing the manner of seeking permission for closure and by providing dealing with the said application by the competent authority and providing guidelines for the exercise of such power. Amended provisions of Section 25-O of Industrial Disputes Act do not violate the fundamental right guaranteed under Article 19(1)(g) of the Constitution.

Section 25-P. Special provision as to restarting of undertaking closed down

1. (1986) 1 Lab LJ 490 (SC).
2. (1996) 1 LLJ 962 (SC).
3. AIR 1979 SC 25.
4. (1995) 1 LLJ 673 (Orissa).
5. (1978) 2 LLJ 527 (SC).
6. Amendment made by Act No. 46 of 1982 and enforced with effect from 21-8-1984.
7. (1992) 92 LLJ 294 (SC).

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before commencement of the Industrial Disputes (Amendment) Act, 1976.—If the appropriate Government is of opinion in respect of any undertaking of an industrial establishment to which this Chapter applies and which closed down before the commencement of the Industrial Disputes (Amendment) Act, 1976,—

(a) that such undertaking was closed down otherwise than on account of unavoidable circumstances beyond the control of the employer ;

(b) that there are possibilities of restarting the undertaking ;

(c) that it is necessary for the rehabilitation of the workmen employed in such undertaking before its closure or for the maintenance of supplies and services essential to the life of the community to restart the undertaking or both ; and

(d) that the restarting of the undertaking will not result in hardship to the employer in relation to the undertaking ;

it may, after giving an opportunity to such employer and workmen, direct, by order published in the Official Gazette, that the undertaking shall be restarted within such time (not being less than one months from the date of order) as may be specified in the order.

Section 25-Q. Penalty for lay-off and retrenchment with previous permission.—Any employer who contravenes the provisions of Section 25-M or Section 25-N shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Section 25-R. Penalty for closure.—(1) Any employer who closes down an undertaking without complying with the provisions of sub-section (1) of Section 25-O shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees or with both.

(2) Any employer, who contravenes an order refusing to grant permission to close down an undertaking under sub-section (2) of Section 25-O or a direction given under Section 25-P, shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both, and where the contravention is a continuing one, with a further fine which may extend to two thousand rupees for every day during which the contravention continues after the conviction.

(3) Any employer who contravenes the provisions of sub-section (3) of Section 25-O shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

It was held in *Excel Wear* v. *Union of India*,[1] that Section 25-R in so far as it relates to the awarding of punishment for violation of provisions of Section 25-O are constitutionally bad and invalid for violation of Article 19(1)(g) of the Constitution.

Section 25-S. Certain provisions of Chapter V-A to apply to an industrial establishment to which this Chapter applies.—The provisions of Sections 25-B, 25-D, 25-FF, 25-G, 25-H and 25-J in Chapter V-A shall, so far as may be, apply also in relation to an industrial establishment to which the provisions of this Chapter apply.

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1. AIR 1979 SC 25.

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CHAPTER X
UNFAIR LABOUR PRACTICES

Section 25-T. Prohibition of unfair labour practice.—No employer or workman or a Trade Union, whether registered under the Trade Unions Act, 1926, or not, shall commit any unfair labour practice.

Section 25-U. Penalty for committing unfair labour practices.—Any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

Unfair Labour Practices.—A new Schedule V has been added by the Industrial Disputes (Amendment) Act, 1982. In this Schedule unfair labour practices have been defined. It contains a list of such practices as are treated unfair on the part of the employers or their Trade Unions, or on the part of workmen and their Trade Unions.

I. Unfair labour practices on the part of employers and trade unions of employers.

1. To interfere with, restrain from, or coerce, workmen in the exercise of their rights to organise, from, join or assist a Trade Union or to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, that is to say—

(a) threatening workmen with discharge or dismissal, if they join a trade union ;

(b) threatening a lock-out or closure, if a trade union is organised ;

(c) granting wage increase to workmen at crucial periods of the union organisation, with a view to undermining the efforts of the trade union at organisation.

2. To dominate, interfere with or contribute support, financial, or otherwise, to any trade union, that is to say :—

(a) an employer taking an active interest in organising a trade union of his workmen ; and

(b) an employer showing partiality or granting favour to one of several trade unions attempting to organise his workmen or to its members where such a trade union is not a recognised trade union.

3. To establish employer sponsored trade unions of workmen.

4. To encourage or discourage membership in any trade union by discriminating against any workman, that is to say :—

(a) discharging or punishing a workman, because he urged other workmen to join or organise a trade union ;

(b) discharging or dismissing a workman for taking part in the strike (not being a strike which is deemed to be an illegal strike under this Act) ;

(c) changing seniority rating of workmen because of trade union activities ;

(d) refusing to promote workmen to higher posts on account of their trade union activities ;

(e) giving unmerited promotions to certain workmen with a view to creating discord amongst other workmen, or to undermine the strength of their trade union ;

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(f) discharging office-bearers or active members of the trade union on account of their trade union activities.

5. To discharge or dismissed workmen—

(a) by way of victimisation ;

(b) not in good faith, but in the colourable exercise of the employer's right ;

(c) by falsely implicating a workman in a criminal case on false evidence or on concocted evidence ;

(d) for patently false reasons ;

(e) on untrue or trumped up allegations of absence without leave ;

(f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste ;

(g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record or service of the workman, thereby leading to a disproportionate punishment.

6. To abolish the work of a regular nature being done by workmen, and to give such work to contractors as a measure of breaking a strike.

7. To transfer a workman *mala fide* from one place to another, under the guise of following management policy.

8. To insist upon individual workmen, who are on a legal strike to sign a good conduct bond, as a pre-condition to allowing them to resume work.

9. To show favouritism or partiality to one set of workers regardless of merit.

10. To employ workmen as '*badlis*', casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent workmen.

11. To discharge or discriminate against any workmen for filing charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute.

12. To recruit workmen during a strike which is not an illegal strike.

13. Failure to implement award, settlement or agreement.

14. To indulge in acts of force or violence.

15. To refuse to bargain collectively, in good faith with the recognised trade unions.

16. Proposing or continuing a lock-out deemed to be illegal under this Act.

II. Unfair labour practices on the part of workmen and trade unions of workmen

1. To advise or actively support or instigate any strike deemed to be illegal under this Act.

2. To coerce workmen in the exercise of their right to self-organisation or to join a trade union or refrain from joining any trade union, that is to say—

(a) for a trade union or its members to picketing in such a manner that non-striking workmen are physically debarred from entering the work places ;

(b) to indulge in acts of force or violence or to hold out threats of intimidation in connection with a strike against non-striking workmen or against managerial staff.

3. For a recognised union to refuse to bargain collectively in good faith with the employer.

4. To indulge in coercive activities against certification of a bargaining representative.

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5. To stage, encourage or instigate such forms of coercive actions and wilful 'go slow', squatting on the work premises after working hours or 'gherao' of any of the members of the managerial or other staff.

6. To stage demonstrations at the residences of the employers or the managerial staff members.

7. To incite or indulge in wilful damage to employer's property connected with the industry.

8. To indulge in acts of force or violence or to hold out threats of intimidation against any workman with a view to prevent him from attending work.

It is difficult to define and lay down exhaustive test of unfair labour practice, but it may be said that any practice, which violates the directive principles of State policy contained in Article 43 of the Constitution and such other Articles as deal with the decent wages and living conditions for workmen amount to unfair practice.

In *Eveready Flash Light Company* v. *Labour Court Bareilly*,[1] the company appointed a workman on daily rate basis on 18th January, 1958 after trying him for four days. On April 12, 1958 he was appointed on probation for 6 months which could be further extended by the company at its discretion. He was elected a member of the working committee of the union on September 9, 1958. On 10th September the management served him with a notice of warning that inspite of repeated warnings he had shown no improvement in his work. The warning was repeated on 11th October. On November 21, 1958 his service was terminated. The Union raised an industrial dispute and the Labour Court found no justification for putting the workman on probation after he had been tried and that the condition of putting him on probation as communicated by letter of 12th April was just to delay making him a permanent employee. The Company preferred a petition in the Allahabad High Court. It was held that "a condition of employment which is designed to invest the employer with arbitrary power to keep the workmen at his mercy as regards his chance of being made permanent, and to eventually lead to deprive him of such chance would amount to unfair labour practice". It was further observed that it is not necessary that there must be numerous transactions before the employer could be branded guilty of unfair labour practice and that he could be held guilty of such practice in respect of one contract of employment only.[2]

In *L.H. Factories and Oil Mills, Pilibhit* v. *State of U.P.*,[3] some of the workers were promoted to the rank of driver-cum-assistant-fitter. Other ten workers who were senior in service and also better qualified but were not so promoted raised an industrial dispute alleging discrimination in the matter of promotion. They alleged that they were victimised for their trade union activities. The Labour Court was of the view that "promotions were not given on merits but were given to pamper one association at the cost of the rival association". The company filed a writ in the Allahabad High Court. It was held that the promotions were made to please one trade union and strengthen it against the rival union and to which the disputing workmen were members. It was observed that any systematic attempt by the employer to use his powers of management to disrupt the trade union of his employees amounts to unfair labour practice. Unjust dismissal, unmerited promotion, partiality towards one set of workers regardless of merits are some illustrations of unfair labour practice.

In *Bengal Bhatdee Coal Co.* v. *Singh*,[4] thirteen workmen during strike obstructed other workers who were willing to work from doing their work by sitting down between

1. (1962) 2 LLJ 204.
2. *Ibid.*
3. (1961) 1 LLJ 686.
4. (1983-64) 25 FJR 406.

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the tramlines. The Company served charge-sheets on them. The welfare officer of the Company conducted domestic enquiry and recommended their dismissal. The Supreme Court observed that looking at the nature of the offence committed by these workmen it cannot be said that the punishment inflicted was grossly out of proportion or was inconscionable. Therefore, the action taken by the Company in dismissing these employees did not amount to victimization. Although the relations between the Company and the union to which these workmen were members were not happy but this fact would by itself be no evidence to prove victimization for if that were so, it would mean that the active workers of a union with which the employer is not on good terms would have a *carte blanche* to commit any misconduct and get away with it on ground that relations between the employer and the union were not happy.[1]

In *Hind Construction and Engineering Company*,[2] it was a custom that when a holiday fell on Sundary, the next day was declared a holiday. In 1961, January 1, fell on Sundary but the company refused to declare the 2nd January a holiday. Eleven permanent employees refused to work on that day. They were suspended, charge-sheeted and dismissed after holding a domestic enquiry. The union raised an industrial dispute. The Industrial Tribunal held that the punishment of dismissal for one day's absence was unjustifiably severe and amounted to victimization. In a special leave to appeal the case was considered by the Supreme Court wherein it was observed that "where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such that no reasonable employer would ever impose it in like circumstances, the Tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice".[3] In the present case the punishment was such that no reasonable employer would have imposed it in like circumstances unless it served some other purpose. The absence of eleven workmen on a particular day was an act of misconduct for which a lesser punishment of warning, fine or treating the same as leave without pay might be imposed.

If *badlis*, casuals or temporary workers are continued for long years, the object is manifestly to deprive them of the status of permanent employees and this amounts to unfair labour practice on the part of the employer.[4]

Victimization.—Victimization means one of two things. One is when the workman concerned is innocent and yet he is punished because he has in some way displeased the employer. For example, by being an active member of a Union of workmen who were acting prejudicially to the interests of the employer.[5] The second instance is where an employee has committed an offence but is given a punishment quite out of proportion to the gravity of the offence, simply because he has incurred the displeasure of the employer, or where the punishment is shockingly disproportion to the misconduct[6] or is such as no reasonable employer would impose under the circumstances.[7] If an employer punishes an employee for a wrong which someone else has committed, it would be right to infer that the employee is victimized by being made a scape-goat to him.[8]

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1. (1963-64) 25 FJR 406.
2. (1965) 1 Lab LJ 462 (SC).
3. *Hind Construction and Engineering Co. Ltd.* v. *Their Workmen*, (1965) 1 LLJ 462 (SC).
4. *Chief Conservator of Forests & another* v. *Jagannath Maruti Kondhare*, (1996) 1 LLJ 1223 (SC).
5. *National Tobacco Co. of India Ltd.* v. *Fourth Industrial Tribunal*, (1960) 2 LLJ 175.
6. *Ibid.*
7. *Hind Construction and Engineering Co. Ltd.* v. *Their Workmen*, (1965) 1 LLJ 462 (SC).
8. *Sridharan Motor Service* v. *Industrial Tribunal*, (1959) 1 LLJ 380.

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CHAPTER XI
PENALTIES

Section 26. Penalty for illegal strikes and lock-outs.—Section 26(1) prescribes a penalty which can be imposed on any workman who commences, continues or otherwise acts in furtherance of a strike which is illegal under this Act. Thus to penalise a workman under Section 26(1) two conditions must be fulfilled, namely,—

(1) A workman must commence, continue or in some other manner act in furtherance of a strike ; and

(2) Such strike must be illegal under the Act.

Any workman found guilty of participating in an illegal strike shall be punishable with imprisonment for a term which may extend to one month or with a maximum fine of rupees fifty or with both.

Section 26(2) provides that an employer shall be punishable with imprisonment extending to one month or with a maximum fine of rupees one thousand or with both if,

(1) Such employer commences, continues or otherwise acts in furtherance of a lockout ; and

(2) Such lockout is illegal under this Act.

Adjudicatory authorities under the Act have no jurisdiction to take cognizance of an offence and impose the penalty, but a Criminal Court of competent jurisdiction shall take cognizance of the offence on a complaint made by the appropriate Government.[1] Provisions relating to cognizance of offences under the Act are contained in Section 34 of the Act.

Section 27. Penalty for instigation, etc.—Section 27 of the Act makes the following acts punishable, namely—

(1) instigation to others to take part in an illegal strike or lock-out ;

(2) incitement to others to take part in illegal strike or lock-out ; or

(3) otherwise acting in furtherance of a strike or lock-out which is illegal under this Act.

Any person who is neither a workman nor employer is covered by this section. The outsiders have no personal interest in a dispute, an act of incitement or instigation of an illegal strike or lock-out by them is more severely punishable for they do so with ulterior motives. What amounts to instigation or incitement depends upon the facts of each case. Penalty under this section shall be attracted only when the strike or lock-out is illegal because incitement or instigation of every strike is not made penal. But there must be something tangible in evidence to show that the persons responsible for instigating or inciting were deliberately trying to stir up other persons to bring about a certain object.[2]

Penalty under Section 27 may extend to six months' imprisonment or fine extending to one thousand rupees or both.

Section 27 was held to impose no unreasonable restriction upon the fundamental rights guaranteed by Articles 19(1)(a) and 19(1)(c) of the Constitution. Hence this

1. *Vijay Kumar Oil Mills* v. *Their Workmen*, 1952 LAC 342 (LAT).
2. *State of Bihar* v. *Ranen Nath*, AIR 1958 Pat 259.

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section is not unconstitutional.[1]

Section 28. Penalty for giving financial aid to illegal strikes and lock-outs.—To attract the provisions of Section 28 it should be proved that the strike or lock-out was illegal and the accused had knowledge that it was illegal. Any person who knowingly expends or applies any money in direct furtherance or support of any illegal strike shall be punishable under this section. Punishment may extend to six months' imprisonment or one thousand rupees fine or both. The use of word "knowingly" indicates that the accused must have knowledge that the strike or lock-out which he supported was illegal. Further, the use of the expression "any person" connotes that a workman or non-worker may be punished for giving financial aid to an illegal strike or lockout calculated to disrupt industrial peace and harmony.

Section 29. Penalty for breach of settlement or award.—In order that a person may be penalised under Section 29 of the Act the following facts must be proved :

(1) An award or settlement in operation at the time of breach ;
(2) Such award or settlement must be valid ;
(3) The award or settlement must be binding on the accused ;
(4) The accused must be responsible for committing breach of such award or settlement ; and
(5) The appropriate Government must have made complaint regarding the breach.

If the above requirements are cumulatively fulfilled the accused shall be punishable with imprisonment extending to six months or with fine or with both. These punishments are meant for a breach in the first instance. If the breach is continuing a further fine which may extend to two hundred rupees for every day during which the breach continues after the conviction for the first breach, may be imposed. The Court trying the offence is given direction to pay whole or any part of the fine realised from the offender to any person who in its opinion has been injured by such breach. For successful conviction of the accused, proof of *mens rea* on his part is not necessary for an offence under Section 29.[2]

To support any case of prosecution it is necessary that the award or settlement, the breach of which is complained must be in operation and binding on the parties.[3] Commencing a strike or acting in furtherance of it in breach of a settlement binding on the person who so commences it or acts in its furtherance is an offence punishable under Section 29.[4] A prosecution under Section 29 does not deprive the parties to take action to enforce their respective rights which the award confers on them.[5] Thus besides prosecution under Section 29, a party can take action for the recovery of his dues under Section 33-C of this Act or under the Payment of Wages Act provided right have accrued by virtue of an award or settlement.[6]

Section 30. Penalty for disclosing confidential information.—Section 21 provides that certain matters are to be kept confidential. Any person who discloses any information in contravention of Section 21 shall be penalised under Section 30 of the Act. Punishment provided is imprisonment extending to six months or fine upto rupees one thousand or both. For valid exercise of power under this section the following conditions must be satisfied :

(1) A complaint must have been made by or on behalf of—

1. *Raja Kulkarni* v. *State of Bombay*, AIR 1954 SC 73.
2. *State* v. *Caulfield Holland*, AIR 1954 Bom 70.
3. *State of Madras* v. *C.P. Sarathy*, (1953) 1 LLJ 174 SC.
4. *Workmen M.I. Co.* v. *Motor Industries Co.*, AIR 1969 SC 1280.
5. *Bilash Chandra Mitra* v. *Belmer Lawrie and Co.*, (1953) 1 LLJ 337 (Cal).
6. *Md. Qasim Lari* v. *Md. Shamsuddin*, AIR 1957 Pat 683.

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(a) the Trade Union ; or
(b) the individual business affected ;

(2) Complaint should be made to the appropriate Government ;

(3) Complaint should be against any person who wilfully discloses any such information as is referred to in Section 21, and the disclosure must be in contravention of the provisions of Section 21.

The use of the expression "wilfully" implied that *mens rea* is an essential element of an offence under this section. In other words, only a disclosure of an information made knowingly and deliberately shall be covered by this section.

Section 30-A. Penalty for closure without notice.—Any employer who closes down any undertaking without complying with the provisions of Section 25-FFA shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

Section 31. Penalty for other offences.—Section 31(1) provides that any employer who contravenes the provisions of Section 33 shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

Section 31(2) provides that whoever contravenes any of the provisions of this Act or any rule made thereunder, shall, if no other penalty is elsewhere provided by or under this Act for such contravention, be punishable with fine which may extend to one hundred rupees.

Sub-section (1).—A Criminal Court has jurisdiction to try any employer for violation of Section 33. The two Sections 31 and 33 are intended to protect the rights of workmen pending industrial dispute and for that purpose the employer is prohibited from doing anything to the prejudice of workmen without express permission or approval of the authorities before whom a reference is pending.

In *Carborandum Universal* v. *R. Balasubramanian*,[1] certain workmen of the appellant Company were dismissed. The Company was prosecuted under this section. The dismissal order was later on withdrawn. It was held that since the order of dismissal, which formed the basis of the prosecution, was withdrawn, the prosecution instituted in consequence thereof shall also be dropped.

Sub-section (2).—This sub-section confers residuary power on a Criminal Court to try breach of any other provision of the Act or any rule made under the Act, for which no penalty is specifically provided by or under the Act.

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1. AIR 1977 SC 2251.

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CHAPTER XII
MISCELLANEOUS

Section 32. Offence by companies etc.—Section 32 provides that where a person committing an offence under this Act is a company, or other body corporate, or an association of persons (whether incorporated or not), every director, manager, secretary, agent or other officer or person concerned with the management thereof shall unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence.

It is significant to note that the expression company in this section includes (i) any body corporate or (ii) any association of persons whether incorporated or not. This section makes a (i) director, (ii) manager, (iii) secretary, (iv) agent, or (v) other officer or person concerned with the management of the company, etc. liable for any of the offence unless he proves that the offence was committed without his knowledge or consent.

It shall be the duty of the prosecution to establish that a valid award has not been implemented and also that the persons are the officials as stated above. Once it is proved, the burden of proving the fact that the offence has been committed without his knowledge or consent shall be upon the accused. Thus the only defence available under this section to any of the accused person is to prove that the offence was committed without his knowledge or consent.

Section 33. Conditions of service, etc., to remain unchanged.—The purpose of Section 33 is to maintain *status quo* during the pendency of certain proceedings under this Act. It ensures against victimisation of workman by the employer.

Section 33(1) applies during the pendency of the following proceedings, namely :—

(a) conciliation proceedings before a conciliation officer or a Board ;

(b) any proceeding before an arbitrator ; and

(c) any proceeding before a Labour Court, Tribunal or National Tribunal.

The above proceedings must be in respect of an industrial dispute. While any such proceeding is pending, the employer is prohibited to take the following actions, except with express permission in writing of the authority before which the proceeding is pending :

(a) The employer shall not in regard to any matter connected with the dispute, alter to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding ; or

(b) The employer shall not discharge, dismiss or otherwise punish for any misconduct connected with the dispute any workmen concerned in such dispute.

It is not every alteration in the conditions of service of workmen concerned in the dispute, but an alteration in regard to any matter connected with the pending dispute, which is prohibited. For application of Section 33(1)(a) the following conditions must be fulfilled :

(i) Some proceeding under the Act must be pending before any one of the authorities mentioned therein ;

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(ii) There must be some alterations in the conditions of service of workmen ;

(iii) The alteration must be in the conditions of service as were applicable to the workmen concerned immediately before the commencement of such proceedings ;

(iv) The alteration must be to the prejudice of the workmen concerned in such dispute (*i.e.*, if the alteration made is in favour of the workmen, it shall be valid) ;

(v) The alteration should be in regard to any matter connected with the pending dispute ;

(vi) The workman, who can claim protection under this section, should not only be a workman within the meaning of Section 2(s) but should also be a workman connected with the pending dispute ;

(vii) The action should have been taken without the express permission in writing of the authority before which proceeding is pending.

For application under Section 33(1)(b) the following conditions must be fulfilled :—

(i) Some proceeding should be pending before one of the authorities under this Act ;

(ii) The workman claiming protection under this section should not only be a workman within the meaning of Section 2(s), but should also be a workman connected with the pending dispute ;

(iii) The action taken should be discharge or punishment by way of dismissal or otherwise ;

(iv) Such discharge or punishment should be for any misconduct connected with the pending dispute ;

(v) The action should have been taken without the express permission in writing of the authority before which the proceeding is pending.

Section 33(2) provides that the employer may take the following actions during the pendency of any proceeding in respect of an industrial dispute :—

(a) he may alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding ;

(b) he may discharge or punish, whether by dismissal or otherwise, that workman for any misconduct not connected with the dispute.

The right of the employer to take action is subject to the following conditions :

(i) the action taken should be in accordance with the Standing Orders applicable to workman connected in such dispute ; or

(ii) where there are no standing orders, the action taken should be in accordance with the terms of the contract, whether express or implied, between the employer and the workmen ;

(iii) where a workman is discharged or dismissed he shall be paid wages for one month ; and

(iv) in case of discharge or dismissal an application should have been made by the employer to the authority before which the proceeding is pending, for approval of the action taken by the employer.

Section 33(3) deals with the right of "protected workman". The employer shall not take the following action against a 'protected workman' in regard to any matter connected with the pending dispute :—

(i) The employer shall not alter, to the prejudice of protected workman the

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conditions of service applicable to him immediately before the commencement of such proceedings ;

(ii) The employer shall not discharge, or punish, whether by dismissal or otherwise such protected workman.

It is further provided that the prohibition operates during the pendency of any proceedings in respect of an industrial dispute. No alteration in the conditions of service, discharge or dismissal, etc., can be made without the express permission in writing of the authority before which the proceeding is pending.

For the application of Section 33(3) the following conditions must be fulfilled :

(1) Some proceeding should be pending before any one of the authorities under this Act ;

(2) The workman claiming protection should not only be a workman within the meaning of Section 2(s), but should be a protected workman and a workman concerned in the pending dispute ;

(3) There should be alteration in the conditions of service applicable before the commencement of the proceeding or discharge or punishment by way of dismissal or otherwise of such protected workman ;

(4) The alteration in the conditions of service should be to the prejudice of protected workman ;

(5) The action taken may be even in regard to any matter not connected with the pending dispute ;

(6) The action should have been taken without the express permission in writing of the authority before which the proceeding is pending.

Protected workman.—Explanation to Section 33(3) defines a protected workman. The definition is for the purposes of this sub-section only. In relation to an establishment protected workman means ;

(i) a workman who is a member of the executive or other office bearer of a registered trade union connected with the establishment ; and

(ii) who is also recognised as 'protected workman' under the rules applicable to the establishment.[1]

Section 33(4) provides that in every establishment the number of recognised protected workmen shall be one per cent of the total number of workmen employed therein. But there shall be a minimum of five and a maximum of one hundred 'protected workmen'. The appropriate Government is empowered by this sub-section to make rules for choosing and recognising the protected workman. It is also empowered to make rules for distribution of protected workmen among various trade unions connected with the establishment.[2]

Section 33(5) deals with the disposal of an application made by the employer for approval of the action taken by him to Conciliation Officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal. The authority shall without delay hear the application and dispose it within a period of three months from the date of receipt of such application. It means that a proper order in respect of such application should be passed as expeditiously as possible on the application.[3]

Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing extend such further period as it may think fit.

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1. Refer to Rule 61 of the Industrial Disputes (Central) Rules, 1957 which deals with "Protected Workmen".

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3. *Tata Iron and Steel Co. Ltd.* v. *S.N. Modak*, (1956) 2 LLJ 128 (SC).

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Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub-section had expired without such proceedings being completed.

During the pendency of.—The period between the commencement and conclusion of conciliation, adjudication or arbitration proceeding is the period of pendency of such proceeding. Section 20 of the Act deals with the commencement and conclusion of proceeding under this Act. Provisions of this section would be attracted if any orders as prohibited by this Act is made during the pendency of such proceedings ; it is not necessary that the order should also be communicated to the workmen. A workman was dismissed from service on 12th November, 1963, by an order of the Managing Director, Syndicate Bank Limited for wilful disobedience of his transfer order. An appeal against the order was made on 17th December, 1963. The appeal was dismissed on 20th March, 1964. A dispute was referred by the Central Government on 8th January, 1964, to Industrial Tribunal. The workman made a complaint on 4th June, 1964, on the ground of violation of Section 33(2)(b) of the Act. The Tribunal held that the dismissal order became effective on 20th March, 1964, but the Supreme Court in appeal held that on reasonable and natural interpretation of Section 33, the order of dismissal is the original order passed on 12th November, 1963, and as there was no dispute pending on that date, there was no contravention of Section 33 as alleged.[1]

Alteration in conditions of service.—Only such alteration in the conditions of service as are prejudicial to the interest of a workman are restricted. Any reduction or cut in the wages of a workman[2] or a lay-off exceeding the period provided in the standing order,[3] or refusal to provide work to a casual workman who reported for work after his recovery from illness caused by an injury sustained by him while on duty,[4] are all a change in the conditions of service of the workman. In *Bhavnagar Municipality* v. *A. Karimbhai*,[5] the Municipality retrenched its daily rated worker in its Water Works section during the pendency of an industrial dispute before the Tribunal without obtaining prior permission of the Tribunal. The subject-matter of dispute was directly connected with conversion of the temporary employment of such workers into permanent. It was held that the retrenchment amounted to a change in the conditions of service. The alteration was in regard to a matter connected with the pending industrial dispute. There was a contravention of Section 33(1)(a) on the part of the Municipality.

Duties of Conciliation Officer.—The duties of a conciliation officer when acting under Section 33 of this Act should be considered quasi-judicial. However, where no proceedings at all are started under that section, orders passed by him are purely administrative and no writ will lie in such a contingency.[6]

Suspension of workmen before obtaining permission.—The right of an employer to suspend an employee after holding proper enquiry pending proceedings under Section 33, without taking permission of the authority before which the proceedings are pending was reviewed by the Supreme Court in *Hotel Imperial* v. *Hotel Workers' Union*.[7] A number of disputes between the Hotel Imperial and their workmen were under consideration by the Central Government. In the meantime the management sought approval for dismissal of 22 workmen, which led to a strike. The management on October 3, 1955, issued notices directing the workmen to report to their duties within

1. *Syndicate Bank Ltd.* v. *Ram Nath V.K. Bhatt*, (1967) 2 LLJ 745 (SC).
2. *National Coal Co.* v. *L.P. Dave*, (1968) 1 LLJ 84 (Pat).
3. *Modi Soap Works* v. *Kirna*, (1957) 1 LLJ 673 (LAT).
4. *Bhuwalka and Co.* v. *Ramjhalak*, (1966) 1 LLJ 288 (LAT).
5. AIR 1977 SC 1229.
6. *Gajanan* v. *Sallitho Ores*, AIR 1974 Goa 25.
7. (1959) 2 LLJ 544 (SC).

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3 hours failing which action would be taken against them. The workers ignored the directive and the management issued another notice on the same day asking them to show cause why disciplinary action should not be taken against them. The workers in the meantime were suspended. On 7th October the management informed them of its decision to dismiss them and to continue their suspension pending permission to dismiss by the authority concerned. The workmen challenged the management's right to suspend without pay. On special appeal the Supreme Court laid down in the following principles governing the question of suspension before permission of the Tribunal :—

(1) The common law right of the master to dismiss his servant has been subjected by Section 33 to a ban. The statutory ban under this section can be removed by obtaining prior permission of the Authority concerned. Pending permission the master can, after holding a proper enquiry, temporarily terminate the relationship of master and servant by suspending his employee.

(2) The ordinary law of master and servant as to suspension has been modified in view of the fundamental change introduced by Section 33 and a term should be implied in the contract of employment that if the master has held a proper enquiry and came to the conclusion that the servant should be dismissed and in consequence suspends him pending the permission required under Section 33, he has the power to order such suspension, thus suspending the contract of employment temporarily, so that there is no obligation on him to pay wages and obligation on the servant to work.

(3) The existence of such an implied term does not bar the Tribunal to grant interim relief if it has the power to do so under the Act but such relief should not be the whole relief which the workman will get if he finally succeeds.

The following principles laid down by the Supreme Court in different cases are also relevant in this connection :—

(1) Suspension of a workman pending departmental enquiry or pending permission of the authority before which the proceedings might be pending is not punishment even though it is without pay for an indefinite period.[1]

(2) Where the employer came to the conclusion, after proper enquiry that dismissal was the proper punishment and applied for permission to dismiss the concerned employee, the permission if granted would relate back to the date when the decision was taken by the employer to dismiss and the application has been made for permission.[2]

However, the law relating to Payment of subsistence allowance during the period of suspension pending application under this section before Authority has undergone substantial change in view of decision of Supreme Court in *Fakirbhai Fulbhai Solanki* v. *The Presiding Officer and another*,[3] In this case a workman was charged for playing cards with two other workmen during working hours of the factory. He was protected workman. After domestic inquiry the workman was found guilty of misconduct and the Management decided to dismiss him from service. The workman was suspended pending disposal of the application made by the Management to the Industrial Tribunal seeking permission for dismissal, without any wages and allowance. The workman filed a complaint under Section 33-A alleging violation of Section 33 of the Industrial Disputes Act. Both the application of the Management and complaint of the workman

1. *Lakshmi Devi Sugar Mills Ltd.* v. *Ram Sarup*, (1957) 1 LLJ 17 (SC).
2. *Kalyani P.H.* v. *Air France*, (1963) 1 LLJ 679 (SC).
3. (1986) 2 Lab LJ 124 (SC).

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were disposed of by the Tribunal after 6 years. The Tribunal granted the permission sought for by the Management and dismissed the complaint of the workman. Hence appeal by special leave was filed in the Supreme Court. It was held that an order of suspension no doubt prevents the employee from rendering his service but it does not put an end to the employment or the relationship of master and servant between the Management and the workman. Because it is difficult to anticipate the results of an application made before the Tribunal, the workman against whom the application is made should be paid some amount by way of subsistence allowance to enable him to maintain himself and the members of his family and also to meet the expenses of the litigation before the Tribunal. If no amount is paid during the pendency of such an application, it has to be held that the workman concerned has been denied a reasonable opportunity to defend himself in proceedings before the Tribunal. Such denial leads to violation of principles of natural justice and consequently vitiates the proceedings before the Tribunal under Section 33(3) of the Act and any decision given in these proceedings against the workman concerned. The amount of subsistence allowance payable to a workman during suspension shall be such as may be fixed either by the standing orders or in the absence of any such standing order by the authority before which the application for permission is pending. It was further held that where the order of dismissal is successfully challenged on the ground of non-payment of subsistence allowance for the period of suspension during the pendency of the application under Section 33(1) or Section 33(3) of the Act, the Management may ask for the permission of the authority again after paying or offering to pay to the workman concerned, within a reasonable time to be fixed by the authority concerned, the arrears of subsistence allowance at the rate stated above.

Jurisdiction of Tribunal under Section 33.—An application for permission by the employer under Section 33(1) must be accompanied with a statement of (i) contemplated action falling within the scope of the ban ; and (ii) the grounds on which the permission is sought.[1] In order that the permission may be accorded to the employer, he must fulfil the following requirements :

(i) he should make out a *prima facie* case,[2]

(ii) he should have acted *bona fide*[3] and

(iii) he must have held a fair inquiry before passing the order.[4]

(i) Prima facie case.—A *prima facie* case means a case which can be said to be made if the evidence given in support of it were believed, *i.e.*, whether on the basis of that evidence it was possible to arrive at the conclusion in question.[5] A *prima facie* case is made out if the Tribunal comes to the conclusion that a fair enquiry was held by the management and it had *bona fide* come to the conclusion that workman was guilty of misconduct.[6]

(ii) Bona fide action.—The conclusion is said to have been reached *bona fide* if there is no colourable exercise of power by the employer to discharge or dismiss a workman in accordance with the Standing Orders, or as a result of victimisation or unfair labour practice.[7] The burden lies on the party alleging *mala fide* to adduce evidence in support of the plea.[8] The Tribunal shall not give its finding that the

1. Industrial Disputes (Central) Rules, 1957, R. 60.
2. *Atherton West and Co. Ltd.* v. *Suti Mill Mazdoor Union*, (1953) 2 LLJ 32 (SC).
3. *Ibid.*
4. *Lakshmi Devi Sugar Mills Ltd.* v. *Ram Sarup*, (1957) 1 LLJ 17 (SC).
5. *Martin Burn Ltd.* v. *R.N. Banerjee*, (1958) 1 LLJ 247 (SC).
6. *Lakshmi Devi Sugar Mills Ltd.* v. *Ram Sarup*, (1957) 1 LLJ 17 (SC).
7. *Murugan Mills Ltd.* v. *Industrial Tribunal*, (1965) 1 LLJ 422 (SC).
8. *Orissa Cement Ltd.* v. *Their Workmen*, (1970) 2 LLJ 91 (SC).

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management acted *mala fide* if on the basis of the material a reasonable man would have come to the same conclusion which the management had reached.[1]

(iii) Fair inquiry.—The employer has a common law right to deal in accordance with law with any case of misconduct of those who are employed by him. He has a right to hold a domestic enquiry to come to the conclusion and to punish for any such misconduct. But where the employer wishes to take an action at a time when conciliation or adjudication proceeding with regard to any dispute between him and his employees are pending, his right to take action is limited by Section 33. The requirement of "fair enquiry" for permission or approval under Section 33 was considered by the Supreme Court in *Workmen of Motipur Sugar Factory* v. *Motipur Sugar Factory (P) Ltd.*[2] It was held that absence of domestic enquiry would not vitiate the disciplinary action taken by the employer. But in order that permission may be accorded, the employer will have to justify his action before the Tribunal. For a domestic inquiry to be fair the rules of natural justice must be followed. Natural justice requires that the contesting parties should be given opportunity of being heard, no man should be a judge of his own cause ; the decision arrived at should be in good faith and an orderly course of procedure should be adopted during inquiry.[3]

Further in dealing with the merits of a case the employer should confine himself to the charge-sheet served by him to the employee. If the alleged misconduct of the employee has no relation to the charge framed against him, the enquiry in respect of such charge is nothing more than a pretext to punish him for something else and therefore it would amount to victimization. The Tribunal can interfere with the disciplinary action taken by the employer if there is want of good faith for the action taken is in the nature of victimization or unfair labour practice or the Management is guilty of violation of the principles of natural justice or when on the basis of the material the finding arrived at is completely baseless or perverse.[4]

In *Union of India and others* v. *Mohd. Ramzan Khan*,[5] the question was whether with the alteration of the provisions of Article 311(2) under the Forty-second Amendment of the Constitution doing away with the opportunity of showing cause against the proposed punishment, the delinquent has lost his right to be entitled to a copy of the report of enquiry in the disciplinary proceedings. It was held that supply of a copy of the enquiry report along with the recommendations, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the delinquent would therefore be entitled to the supply of copy thereof. The said amendment has not brought any change in this position. The delinquent will also be entitled to make a representation against it and non-furnishing of the report would amount to violation of rules of natural justice and would make the final order liable to challenge.

Where the action taken by the employer is in the nature of victimization or unfair labour practice, the fact that there is no violation of the principles of natural justice, in the course of the domestic enquiry will absolutely lose its importance or efficacy.[6] Similarly, if there is violation of the principles of natural justice in the enquiry, the Tribunal can go into the whole question relating to the misconduct and come to its own conclusion.[7] Where the Tribunal is of the opinion that the inquiry conducted by the

1. *Bangalore Woollen, Cotton and Silk Mills Co. Ltd.* v. *Dassappa*, (1960) 2 LLJ 39 (SC).
2. (1965) 2 LLJ 162 (SC).
3. *Saxby and Farmer India Ltd.* v. *Third Industrial Tribunal*, (1962) 2 LLJ 52 (Cal).
4. *Mackenzie & Co. Ltd.* v. *Its Workmen*, (1959) 1 LLJ 285 (SC).
5. (1991) 1 Lab LJ 29 (SC).
6. *Bharat Iron Works* v. *Bhagubhai*, AIR 1976 SC 98.
7. *M.S. Dhanwal* v. *Hindustan Motors*, AIR 1976 SC 2062.

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employer was not fair, it can request the employer to produce evidence to justify the action taken.[1]

In *Desh Raj Gupta* v. *Industrial Tribunal, Lucknow and Another*,[2] the Tribunal on finding that domestic inquiry was in violation of natural justice, asked the Management to justify the punishment by adducing additional evidence. It was held that the Tribunal by giving such an opportunity only reminded the employer of his rights and there is no illegality in the action of the Tribunal. But the Supreme Court upheld the argument of the workman that the inquiry having been held to be vitiated on account of violation of principles of natural justice his dismissal could not relate back to the date of order of dismissal but could operate only from the date of the award of the Tribunal which on the basis of evidence adduced for the first time by the Management upheld the action of the Management. Therefore, the workman was held entitled for the salary from date of the order of dismissal to the date of award of the Tribunal.

There was some dispute between the Delhi Cloth and General Mills and its workmen with regard to payment of bonus. The workmen dissatisfied with quantum of bonus declared by the company went on strike. It was alleged that L.B. Singh, a workman of the said mill obstructed other workers from going to their work. He along with some other workmen destroyed the mill's property. As it is primary duty of the person making those allegations to establish the same and not for an accused to adduce negative evidence to the effect that he is not guilty, it was held on the facts that the Industrial Tribunal was justified in coming to the conclusion that enquiry proceedings were vitiated by violation of the principles of natural justice and that the Management had not made out a *prima facie* case for grant of the permission to dismiss the workman.[3]

The question whether on setting aside the wrongful dismissal of workmen he should be reinstated or directed to be compensated is a matter within the judicial discretion of the Labour Court. In exercising this discretion fair play towards employee, on the one hand, and interest of the employer, including consideration of discipline in the establishment, on the other, require to be duly safeguarded. If on the facts it is not possible to find cogent material on which the establishment can genuinely be considered to have lost confidence in the integrity of the workman he is entitled to be reinstated.[4] It was held in *Francis Klein & Co.* v. *Workmen*[5] that when an employer loses confidence in his employee particularly in respect of a person who is discharging an office of trust and confidence there can be no justification for directing his reinstatement. Even if an employee is dismissed during pendency of conciliation proceedings in violation of the provisions of Section 33, the Tribunal cannot straightaway order reinstatement of the employee.[6]

In *Workmen of Bharat Fritz Werner (P) Ltd.* v. *Bharat Fritz Werner Pvt. Ltd.*[7] the Supreme Court held that although the impugned order of dismissal may be unsustainable owing to some infirmity in the order, yet it will not be expedient to order reinstatement of the employee who has been found guilty of an activity subversive or prejudicial to the interest of the industry. In such cases the Court should compensate the workman monetarily by awarding him compensation in lieu of reinstatement. In view of this the order of the Bombay High Court ordering reinstatement of a group of employees was

1. *Atlas Cycle Industries* v. *P.N. Thukral*, AIR 1971 P & H 60.
2. (1991) 1 Lab LJ 120 (SC).
3. *D.C. & G. Mills* v. *L.B. Singh*, AIR 1972 SC 1031.
4. *Panitola Tea Estate* v. *Its Workmen*, AIR 1971 SC 2171.
5. AIR 1971 SC 2414.
6. *H.G.E. Corporation* v. *Bishwanath Pd.*, AIR 1971 SC 2417.
7. (1990) Lab IC 844 (SC).

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held not to be sustainable. The Court ordered payment of compensation for loss of back wages and future employment in lieu of reinstatement.

When a preliminary objection before the Tribunal is made that a workman was not concerned in the dispute or was not a workman at all, the Tribunal shall first of all deal with these preliminary objections because the jurisdiction of the Tribunal is based on the determination of these questions.[1] The burden of proof in such a case shall be on the workman to show that he is a workman concerned in a dispute.

The scope of the Tribunal's jurisdiction under Section 33 is very limited. It is only a supervisory and not an appellate or revisional jurisdiction, which a Tribunal exercises while dealing with an application for permission by the employer under Section 33(1). When there is no defect in procedure in a domestic enquiry against an employee, the Tribunal, while granting or withholding permission under this section does not sit as a Court of appeal, weighing, or reappreciating the evidence for itself but only examines the finding of the enquiry officer on the evidence in the domestic enquiry as it is, in order to find out either whether there is a *prima facie* case or if the findings are perverse.[2] Even where permission has been granted by the Labour Court, the workmen can still raise a dispute because grant of permission is neither a ruling on the merits of the employer's action nor is capable of validating a discharge or dismissal effected as a result of permission having been granted.[3]

In *Delhi Municipality* v. *Rasal Singh*,[4] a number of workers mostly employed in road making were on muster rolls for a considerable time. An industrial dispute was pending before the Tribunal relating to their status as regular or casual workers. During the pendency of the dispute their services were discontinued for 4 or 5 days. The workers alleged that the break in service was with an oblique motive to avoid continuous service of 240 days. The Tribunal awarded wages for this period. The Supreme Court held the award to be just.

Domestic enquiry.—In *D.D. Cement Ltd.* v. *Murari Lal*[5] the respondent, an employee of the appellant company was dismissed along with some other workmen for alleged misconduct after a domestic enquiry held by an advocate who was an outsider.[6] The advocate conducting enquiry had at times appeared on behalf of the Management. It was held that this fact by itself could not lead to the conclusion that the enquiry officer was biased against the workmen. In the same case it was held that the blowing of whistle by a workman leading to stoppage of work in factory constituted an act of indiscipline and cannot be tolerated by the employer who attaches any value to discipline in his factory whatever be the reason for the demand for cessation of work.

Where the services of workmen engaged in illegal strike were terminated without holding domestic inquiry and it was proved by the employer that the workmen refused to join duties without any sufficient cause, it was held that the refusal by the workmen to join duty amounted to misconduct on their part and as such the Tribunal would not be justified in directing their reinstatement merely on the ground that no domestic inquiry was held.[7]

Section 33(1)(b).—For the application of this sub-section a workman should be

1. *Tata Iron & Steel Co.* v. *D.R. Singh*, (1965) 2 LLJ 121 (SC).
2. *Bharat Iron Works* v. *Bhagubhai*, AIR 1976 SC 98.
3. *Atherton West & Co. Ltd.* v. *Suti Mill Mazdoor Union*, (1953) 2 LLJ 321 (SC).
4. AIR 1976 SC 2524.
5. AIR 1971 SC 22.
6. For detailed discussion about disciplinary action by the Management against a workman for misconduct *see* "The Problem of Discipline Enforcement in Indian Industry" by Misra, S.N., University of Allahabad Studies, Vol. 6, No. 1, January, 1974.
7. *O.T.F. Mills, Amritsar* v. *Labour Court Jullundur*, AIR 1972 SC 277.

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one concerned in a pending dispute. The expression "workmen concerned in such dispute" is not limited only to such of the workmen who are directly connected with the dispute. It includes all workmen on whose behalf the dispute has been raised as well as those who would be bound by the award which may be made in the said dispute.[1] But unless it is known as to what was the nature of the dispute pending in the said reference, it would plainly be impossible to decide whether the respondent is a workman concerned within the meaning of Section 33(2).[2] It will be on the workman to show that he is a workman concerned in the pending dispute.[3]

If the action proposed by the employer is not for misconduct then there is no restriction upon his right to take action against the employee unless he is a protected workman under Section 33(3). If the misconduct is connected with the pending dispute, express permission under Section 33(1)(b) is required. A retrenchment effected *bona fide* and not by way of punishment but for any other reasons would not be discharge or punishment within the meaning of Section 33(1) or Section 33(2).[4] Similarly termination of service of a workman on account of real and *bona fide* closure of business of the employer, or suspension without pay pending inquiry and application for permission of the authority concerned will not be discharge or punishment under Section 33 of the Act.[5]

Jurisdiction of the Tribunal to grant approval under Section 33(2).—While granting approval under Section 33(2) the following points are to be considered by the approving authority,[6]—

(i) whether the action taken by the employer is in accordance with the standing orders ;

(ii) whether the inquiry into the matter has been held in accordance with the provisions of the standing orders ; and

(iii) whether all the conditions laid down by the proviso to Section 33(2) are fulfilled.

In *Central Bank of India* v. *P.C. Jain*,[7] the Supreme Court observed that, "When an Industrial Tribunal its asked to give its approval to an order of dismissal under Section 33(2)(b) of the Act, it can disregard the findings given by the Enquiry Officer only if the findings are perverse. The test of perversity is that findings may not be supported by any legal evidence at all, or where the finding arrived at by the domestic Tribunal is one at which no reasonable person could have arrived on the material before the Tribunal. It was not for the Tribunal to sit in judgment over the view taken by the enquiry officer about the value to be attached to the evidence of these witnesses, even though the Tribunal thought that the witnesses were unreliable because of circumstances found by the Tribunal in their evidence when dealing with an application under Section 33(2)(b) of the Act".

Termination simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside the scope of Section 33. Misconduct contemplated in Section 33(2)(b) need not be a misconduct enumerated in the standing orders of the company.[8]

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1. *New India Motors Private Ltd.* v. *K.T. Morris*. (1960) 1 LLJ 551 (SC).
2. *Ibid.*
3. *Tea Districts Labour Association* v. *Ex-Employees of Tea Districts Labour Association*. (1960) 1 LLJ 802 (SC).
4. *Hariprasad Shivshanker Shukla* v. *A.D. Diwekar*. AIR 1957 SC 121.
5. *Sasa Musa Sugar Workers* v. *Sobratt*. (1959) 1 LLJ 338 (SC).
6. *Lord Krishna Textile Mills* v. *Workmen*. (1961) 1 LLJ 211 (SC).
7. AIR 1969 SC 983.
8. *M.S. Agarwal* v. *Hindustan Motors*. AIR 1976 SC 2062.

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Where an employee is dismissed and an application under Section 33(2)(b) is made for approval of the action taken by the Management, approval cannot be granted in absence of any satisfactory proof as to the payment of one month's wages to the dismissed employee.[1] In case of a change in the holiday for the Diwali festival on a request by the majority of the workmen the change cannot be considered as alteration in the conditions of service.[2] Even if we assume that the workmen had a right to get a holiday and that it has become a condition of service the festival is to be given on date when the majority of the workmen claim that they are celebrating Diwali.

Where discipline and appeal rules provide that only appointing authority is the disciplinary authority, framing of charges and constituting the disciplinary committee by any authority other than the appointing authority is invalid and in such a case the employee cannot be allowed to rely on a resolution delegating such authority to someone else.[3]

Where the employee was not charged with riotous or disorderly behaviour during the working hours, or the charges against him were not related to the question of discipline, his act would not be one subversive of discipline. Therefore, the Tribunal was justified in declining to grant approval to the action taken by the Management in dismissing the employee for misconduct.[4] In *Eastern E. & T. Co.* v. *Baldeo Lal*,[5] the respondent, an employee of the company was dismissed on charge of misbehaving with customers while an industrial dispute was pending before the Industrial Tribunal. It was held that the employer whose business with the customer is lost because of the behaviour of one of his employees can have no use for the services of that employee and the dismissal of such an employee was justified.

In *Punjab Beverages* v. *Suresh Chand*,[6] the Supreme Court has held that the contravention of Section 33 does not render the order of discharge or dismissal void and inoperative. The only remedy available to the workman for challenging the order of discharge or dismissal is that provided under Section 33-A apart of course from the remedy under Section 10, and he cannot maintain an application under Section 33-C(2) for determination and payment of wages on the basis that he continues to be in service. The workman can proceed under Section 33-C(2) only after the Tribunal has adjudicated on a complaint under Section 33-A or on a reference under Section 10 that the order of discharge or dismissal passed by the employer was not justified and has set aside that order and reinstated the workman.

Where an application is inadvertently made under Section 33(2)(b) of the Act, it may be on a subsequent request made by the employer, treated as one under Section 33(3)(b). In *Borpukhurie Tea Estate* v. *Industrial Tribunal, Assam*,[7] the Company found a protected workman guilty of misconduct and decided to dismiss him. As an industrial dispute was pending before the Tribunal, the appellant informed the workman that he would be dismissed from service but dismissal would not take effect until the permission of the Tribunal was obtained and in the meantime he would remain under suspension. On the same date the company made an application under Section 33(2)(b) for approval of the action. When this application was pending before the Tribunal, the company made an application requesting the Tribunal to treat the application as one under Section 33(3)(b). The prayer was rejected by the Tribunal. On appeal the Supreme Court held

1. *Podar Mills* v. *Bhagwan Singh*, AIR 1979 SC 2224.
2. *A.M. Co.* v. *B.L. Sen*, AIR 1973 SC 2155.
3. *Steel Authority of India* v. *Labour Court*, (1980) 2 LLJ 456.
4. *I.E. & C. Press* v. *M.C. Kanpur*, AIR 1974 SC 1629.
5. AIR 1975 SC 1872.
6. AIR 1978 SC 995.
7. AIR 1978 SC 992.

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that the Tribunal's order was wrong as it should have treated the original application as one under Section 33(3)(b).

Section 33(2) must be so construed as to take within its fold a workman who was employed during the period in respect of which he claimed relief, even though he is no longer employed at the time of the application.[1] The proviso to Section 33(2)(b) contemplates three things ; (i) dismissal or discharge, (ii) payment of wages, and (iii) making of an application for approval to be simultaneous and to be part of the same transaction. It is conduct of the employer that has to be considered from the point of view of finding out whether the dismissal or discharge, payment of wages and making of the application for approval form part of the same transaction.[2]

In *Bharat Electronics Ltd.* v. *Industrial Tribunal Bangalore*,[3] the Management did not include night shift allowance earned in the previous month in the one month's wages paid to a dismissed workman. The workman claimed that the Management has violated the mandate under proviso to Section 33(2)(b). It was held that the requirement under the said proviso that the Management must pay one month's wages to the workman is intended to soften the rigour of unemployment that will face him against whom an order of discharge or dismissal has been passed. One month's wages as provided are conceptually for the month to follow the dismissal or discharge and, therefore, the conclusion is inescapable that the night shift allowance which is contingent upon reporting to duty and the workman being put to that shift cannot be included or form part of one month's wages under the proviso.

Jurisdiction under Section 33 after the publication of award.—It was held in *Tata Iron and Steel Co. Ltd.* v. *S.N. Modak*,[4] that the appropriate authority would continue to have jurisdiction to deal with an application under Section 33(2) even after the publication of its award in the main dispute under Section 17-A of the Act. Later on it was laid down in *P.D. Sharma* v. *State Bank of India*,[5] that the Tribunal will have no jurisdiction to deal with a permission application under Section 33(3) after the publication of the award.

Permission or approval no bar to reference under Section 10.—The permission under Section 33(1) and approval under Section 33(2) will have no effect to validate the discharge or the punishment by way of dismissal or otherwise and would also not bar the raising of an industrial dispute under Section 10 of the Act.[6]

Application for approval of the action taken.—The question, whether the application for approval under the proviso to Section 33(2)(b) should be made before or after the action of discharge or dismissal has been taken by the employer, directly arose before the Supreme Court in *Strawboard Manufacturing Co. Ltd.* v. *Govind*,[7] In this case it was held that the punishment by way of discharge or dismissal, etc., payment of one month's wages and making of an application by the employer for approval of the action to the appropriate authority must take place simultaneously and be part of the same transaction. In other words, the employer after taking an action immediately or within a reasonable time must pay or offer to pay workman his one month's wages and should also make an application to the Tribunal for approval of the action. The application for approval may be made even before taking the proposed action, but it should at the latest be made within a reasonable time after the action proposed has been taken. And until

1. *N.B.C. Corpn.* v. *Pritam Singh*, AIR 1972 SC 1579.
2. *C.S.T. Corpn.* v. *Md. Noor Alam*, AIR 1973 SC 1404.
3. (1990) 2 Lab LJ 32 (SC).
4. (1965) 2 LLJ 128 (SC).
5. (1969) 1 LLJ 513 (SC).
6. *Atherton West and Co.* v. *Suti Mill Mazdoor Union*, (1953) 2 LLJ 321 (SC).
7. (1962) 1 LLJ 420 (SC).

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the approval is granted by the prescribed authority the order is incomplete and cannot terminate the relationship of the employer and employee. If the approval is granted it takes effect from the date on which the order was passed by the employer.[1] In case the approval is not granted, the action taken by the employer is wholly invalid and inoperative.

It was held in *S. Ganpathy and others* v. *Air India and Another*[2] that where an order of discharge or dismissal is passed the *de facto* relationship of employer and employee comes to an end but the *de jure* relationship continues. The *de jure* relationship ends when the tribunal accords its approval.

In *Management of Orissa Road Transport Company Limited* v. *M. Venkata Rao and another*,[3] a workman was discharged from service after departmental proceeding for theft. The action of the management was approved by the Tribunal. The approval was also challenged through a writ petition which was also dismissed. After discharge from service, the workman filed the present petition on the ground that the punishment of discharge from service was disproportionate. It was held that under Section 11-A it was the duty of the Tribunal to consider whether the punishment awarded was just and proper. It was also held that an order of approval under Section 33(2)(b) could not be a bar to the reference of the dispute and the same has to be decided on its own merits. The punishment of discharge from service for theft of two litres of engine oil was held to be disproportionate.

In *Rajendra Jha* v. *Labour Court, Bokaro Steel City and Others*,[4] the appellant was appointed a dresser in the Medical Department of the Steel Authority of India. On March 1, 1975 he was dismissed from service as a result of a domestic enquiry on charge of misconduct consisting of absence from duty, falsification of entries in registers, destruction of records etc. Since an industrial dispute was pending in the Labour Court, Bokaro, between the Management and its workmen an application was filed by the Management under Section 33(2)(b) seeking approval of the Labour Court, Chota Nagpur, to the order of dismissal passed against the appellants. The Labour Court held that the domestic enquiry was invalid but the Management should be given an opportunity to adduce evidence to justify the order of dismissal. On these facts the Supreme Court has held that in an approval proceeding it is open to the employer to lead evidence to justify the order passed against the employee although the right to lead evidence is governed by certain conditions.

Effect of permission or approval.—If the approval under Section 33(2) is not granted the workmen would continue to be in service as if there had been no discharge or dismissal of the employee and he would also be entitled to his full wages from the date of discharge or dismissal.[5] If the approval is granted the action taken by the employer is confirmed with effect from the date of the order of the employer.

Under Section 33(1), results similar to Section 33(2) could be achieved by the employer by putting the employee concerned under suspension, after coming to the conclusion that dismissal is the proper punishment, and applying for permission as provided. In such a case, if the permission is granted, the discharge or dismissal shall take effect from the date of suspension and not from the date of permission. Thus under Section 33(2), on approval being granted, the discharge or dismissal takes effect from the date of the order of the employer and under Section 33(1) the discharge or dismissal on permission being granted takes effect from the date of suspension.

1. *Tata Iron and Steel Co. Ltd.* v. *S.N. Modak*, (1965) 2 LLJ 128 (SC).
2. (1993) 2 LLJ 731 (SC).
3. (1993) 1 Lab LJ 468 (Orissa).
4. (1984) 2 LLJ 459 (SC).
5. *Ibid.*

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In *Md. Akhtar Hussain* v. *State of Bihar and others*,[1] a workman was removed for misconduct without enquiry during pendency of proceedings before Industrial Tribunal. It was held that if the removal was founded on alleged misconduct and no inquiry was held into such allegations and if the approval of the Tribunal before whom an industrial dispute was pending has not been taken, the Management contravenes the provisions of Section 33 and action could be taken under Section 33-A of the Act. The workman would be entitled to reinstatement in service.

Section 33-A. Special provision for adjudication as to whether conditions of service etc. changed during pendency of proceedings.—Where an employer contravenes the provisions of Section 33 during the pendency of proceeding before a Conciliation Officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal, any employee aggrived by such contravention, may make complaint in writing, in the prescribed manner,—

(a) to such Conciliation Officer or Board, and the Conciliation Officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute ; and

(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.

For application of Section 33-A the following requirement must be fulfilled :—

(1) There should be a proceeding pending before a Conciliation Officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal ;

(2) A contravention of Section 33 by the employer during the pendency of such proceedings ;

(3) A complaint in writing in the prescribed manner by the aggrieved employee to the authority before whom the proceeding is pending, against the contravention by the employer ;

(4) The concerned authority shall on receipt of the complaint adjudicate upon it as if it was an industrial dispute referred to or pending before it ;

(5) The concerned authority shall submit its award to the appropriate Government ; and

(6) The award shall be published by the appropriate Government under Section 17-A.

The object of Sections 33 and 33-A is to protect workman against victimization by the employer. To achieve this object Section 33 creates a ban on the right of the employer to change the conditions of services of the employees to their prejudice or to terminate their services under general law governing contract of employment. If the termination of services is a colourable exercise of the power vested in the Management or as a result of victimization or unfair labour practice, the Tribunal would have jurisdiction to intervene and set aside a termination.[2] Where the workmen, working under an old scheme refused to work under a new scheme as it amounted to alteration in conditions of services, were refused wages for a month, their application under Section 33-A was maintainable because refusal to pay wages was not solitary but a continued refusal and thus amounted to a permanent alteration in the conditions of

1. (1988) 1 Lab LJ 325 (SC).
2. *Air India Corpn.* v. *V. A. Rebello*, AIR 1972 SC 1343.

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service.[1]

In *Reserve Bank of India* v. *C.T. Dighe*,[2] a dispute between the Reserve Bank of India and their class III workmen was referred to the National Tribunal for adjudication. While the proceedings were pending before the Tribunal the conditions of eligibility were altered for certain cadre of employees. Bank employees of certain categories were earlier eligible for promotion to those cadres whose eligibility conditions were changed and by subsequent change in these conditions they became ineligible for promotion to that post. Thus the chance of promotion of certain employees was effected by the change in eligibility conditions. This change was challenged to be illegal. The Supreme Court held that a rule which affects the promotion of a person relates to his condition of service but this is not so if what is affected is a chance of promotion only. It is difficult to see how alteration of the condition of eligibility governing employees of a particular cadre can amount to changing the conditions of service of employees of another cadre, assuming that the said conditions are conditions of service. Further it is difficult to think of the conditions of service of an employee as including an implied right to prevent the employer from altering the conditions of other employees.

During the pendency of proceedings.—Provisions of Section 33-A are not attracted in case of every contravention of Section 33. For application of Section 33-A such contravention by the employer must be during the pendency of a proceeding before a Labour Court, Tribunal or National Tribunal.[3] The Tribunal has no jurisdiction to proceed if the employer's act does not fall within the prohibition of Section 33.[4]

Complaint by the aggrieved employee.—In order to claim protection under Section 33-A a workman must satisfy the Tribunal by evidence that he is a workman concerned in a pending dispute and aggrieved by the contravention of Section 33 by the employer.[5] The complaint should be filed by the workman himself or by a registered Trade Union with the written authorisation by the aggrieved workman. A registered Trade Union of which the aggrieved workman is a member, has no right to file a complaint under Section 33-A unless there is authorisation by the aggrieved workman.[6] Section 33-A of the Act does not prescribe any period of limitation of filing application. Two months' time from the date of the expiry of thirty days period from the date of publication of the award in the official Gazette cannot be said to be unreasonable time for filing an application under Section 33-A.[7]

In complaint under Section 33-A even if the employer is found to have contravened the provisions of Section 33, the Tribunal has to pronounce upon the merits of the dispute between parties. For the purposes of the Act the complaint under Section 33-A takes the form of a reference of an industrial dispute by the appropriate authority and has to be disposed of in a like manner. The Tribunal would be committing an error of jurisdiction in refusing to adjudicate the matter and to make its award on the merits as required under the law.[8]

Adjudication under Section 33-A.—Jurisdiction of Labour Court, Tribunal or National Tribunal under Section 33-A is the same as under Section 10. While adjudicating upon a complaint made under Section 33-A, the Tribunal has not only to see whether there is contravention of provisions of Section 33 by the employer during

1. *Hindustan Lever Ltd.* v. *R.M. Ray*, AIR 1973 SC 1156.
2. (1981) 2 LLJ 223 (SC).
3. *National Power Supply Corporation Ltd.* v. *State of Assam*, (1963) 2 LLJ 10 (Assam).
4. *Equitable Coal Co. Ltd.* v. *Algu Singh*, (1958) 1 LLJ 793 (SC).
5. *Digwadih Colliery* v. *Ramji Singh*, (1964) 2 LLJ 43 (SC).
6. *National Power Supply Corporation Ltd.* v. *State of Assam*, (1963) 2 LLJ 10 (Assam).
7. *A.L. Kalra* v. *A.S.R.T. Corpn.*, AIR 1971 AP 57.
8. *Bhavnagar Municipality* v. *A. Karimbhai*, AIR 1977 SC 1229.

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the pendency of proceedings but may deal with the merits of the complaint also. Although termination simpliciter is outside the scope of Section 33 it does not mean that the employer can get away with it by describing it to be a simple termination in his letter of discharge. In case of complaint under Section 33-A the Tribunal would not be debarred from going into the question whether, not understanding the form of the order, in substance it is an action of dismissal for misconduct and not termination simpliciter.[1] Where a complaint is made against an order of dismissal of the employee by the employer it is open to the employer to justify the dismissal on merits by adducing satisfactory evidence before the Tribunal.[2] Therefore contravention of Section 33 is a question related to the jurisdiction and should be decided first, and then the Tribunal can proceed on with the merits of the case. If, judging on the merits, the Tribunal finds that the action of the employer against the aggrieved employee is justified, then contravention of Section 33 may be regarded as a technical breach and will not justify an order of compensation in favour of the employee.[3] However, the Tribunal may grant such relief as it thinks fit and in proper case it may even order reinstatement of an employee.[4] But re-instatement or full wages cannot be granted as interim relief, for interim relief must not be the same relief which a person shall be entitled in case he succeeds in his claim.

In *G.T. Lad* v. *Chemicals & Fibres of India Ltd.*,[5] certain workers had gone on strike during pendency of an industrial dispute in response to the strike notice given by their union. The Management by a letter informed the workers that their failure to join duty by a particular date would be treated as abandonment of service. The workers in reply intimated that they did not intend to abandon service and alleged that the letter was received after the date prescribed therein for joining duty. The Management while acknowledging the receipt of the letter did not refute the allegation of the workmen. The workmen also returned the cheques for their leave salary, gratuity, etc. The workmen were thereafter, dismissed. It was held that "there was nothing in the surrounding circumstances to infer an intention on the part of workmen to abandon the service". Whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case.

Award under Section 33-A.—The Labour Court, Tribunal or National Tribunal shall submit its award to the appropriate Government. The award shall be published and have the same effect as awards given on reference under Section 10 of the Act. The authorities as mentioned in Section 33-A shall adjudicate upon the complaint as if it were a dispute referred to it, in accordance with the provisions of this Act. These provisions sufficiently indicate that once the subject-matter of complaint has been adjudicated upon, the award given and published under Section 17-A, cannot again be made the subject-matter of a dispute, *i.e.*, it would operate as a bar (*res-judicata*) to a subsequent reference of the subject-matter under Section 10 of the Act.

Section 33-B. Power to transfer certain proceedings.—Sub-section (1) empowers the appropriate Government to withdraw any proceeding under this Act pending before a Labour Court, Tribunal or National Tribunal and transfer the same to another Labour Court, Tribunal or National Tribunal, as the case may be, for the disposal of the proceedings. The power as aforesaid can only be exercised in respect of any proceeding pending before the authorities as stated. Any such withdrawal and transfer can be effected by an order issued by the appropriate Government. The order

1. *M.S. Dhantal* v. *Hindustan Motors*, AIR 1976 SC 2062.
2. *Delhi Cloth and General Mills Ltd.* v. *Additional Industrial Tribunal*, (1960) 2 LLJ 712 (SC).
3. *C.A. Roderick* v. *Karam Chand Thapar and Bros. (P.) Ltd.*, (1963) 1 LLJ 248 (SC).
4. *Kamarahatty Co. Ltd.* v. *Ushanath Pakrashi*, (1959) 2 LLJ 556 (SC).
5. AIR 1979 SC 582.

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must also state the reasons therefor. It means it should be speaking order. When any such proceedings is so transferred the authority concerned may, subject to special directions in the order of transfer, proceed either *de novo* or from the stage at which it was so transferred.

Where a proceeding under Section 33 or Section 33-A is pending before a Tribunal or National Tribunal, it may also be transferred to a Labour Court.

Sub-section (2) provides that a Tribunal or National Tribunal may transfer any proceeding under Section 33 or Section 33-A pending before it to a Labour Court provided that following conditions are fulfilled, namely :—

(i) The Tribunal and National Tribunal is authorised by the appropriate Government to effect such a transfer ; and

(ii) The Labour Court to which the proceedings are transferred is one of the Labour Court specified for the disposal of such proceedings by notification in the official Gazette.

When the proceedings are so transferred to a Labour Court, it is empowered to dispose it of. The proviso to sub-section (1) confers similar powers of transfer on the appropriate Government, but sub-section (2) empowers the Tribunal or National Tribunal itself to effect any such transfer.

It was held by the Supreme Court in *Associated Electrical Industries (P) Ltd.* v. *Its workmen*,[1] that the power under Section 33-B can be exercised only after recording the reasons for the transfer and the reasons should be relevant and germane to the transfer in question and should not be extraneous to it.[2] A withdrawal on the grounds of expediency,[3] or for administrative reasons and in public interest would not be sufficient reason justifying the transfer.[4]

In *Management of M/s M.S. Nally Bharat Engg. Co-Ltd.* v. *State of Bihar and others*,[5] the State Government withdrew the pending reference in exercise of the powers under Section 33-B from the Labour Court Dhanbad and transferred it to Court at Patna on the representation of the workmen without sending a copy of their representation to the Management or verifying the facts stated in the application of the workmen. The Supreme Court held that the State Government is under a legal obligation to record reasons in support of its decisions and failure to do so or giving reasons not germane are fatal to the decision. The Court held that fairness requires that the State should have given opportunity to the Management which is a party to the pending reference and verified the correctness of the representation made by the workman. Denial of such opportunity is a fatal flaw to the decision of the Government. Mere denial of opportunity to the employer is sufficient to vitiate the order and it is not necessary for the Management to establish particular prejudice for denial of natural justice is itself a prejudice.

Thus this decision of the Supreme Court has set at rest the conflicting opinions amongst various High Courts[6] on the question whether the Government before

1. (1961) 2 LLJ 122 (SC).
2. *Bombay Union of Journalists* v. *State of Bombay*, (1964) 1 LLJ 351 (SC).
3. *Associated Electric Industries India (P) Ltd.* v. *Its Workmen*, (1961) 2 LLJ 22 (SC).
4. *Workmen of Punjab Worsted Spinning Mills* v. *State of Punjab*, (1965) 2 LLJ 218 (Punjab).
5. (1990) 2 Lab LJ 211 (SC).
6. The conflicting cases are : *Workmen of Punjab Worsted Spinning Mills* v. *State of Punjab*, (1965) 2 Lab LJ 218 (Punj) ; *Management of Shri Ravi Laxmi Ginning and Weaving Mills Ltd.* v. *State of Madras*, (1975) 30 FLR 166 (Mad) ; *Jay Engineering Works Ltd.* v. *The Industrial Tribunal Calcutta*, 1977 Lab IC 1739 (Cal) ; *Muthi Steels India* v. *Additional Labour Court*, (1979) Lab IC 329 (AP) ; *Pioneer Ltd.* v. *Labour Court, Gorakhpur*, (1983) Lab IC 335 (All).

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exercising its power under Section 33-B is required to afford an opportunity of hearing to the other party.

Section 33-C. Recovery of money due from an employer.—Sub-section (1) of Section 33-C deals with the procedure for recovery of money due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A or Chapter V-B. The application for recovery of money due may be made to the appropriate Government and if the Government is satisfied that the claim is genuine, it shall issue a certificate for that amount to the Collector. The Collector shall recover the amount as shown in the recovery certificate as an arrear of land revenue. The application for recovery of money due may be made to appropriate Government either by the workman himself or by any other person authorised by him in writing, or in case of death of a workman by his assignee or heirs. Every such application shall be made within one year from the date on which the money become due to the workman from the employer. It is further provided that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

Section 33-C(2).—This sub-section deals with the jurisdiction of a Labour Court, which is subject to the fulfilment of the following two requirements :

(i) a workman must be entitled to receive from the employer any money or benefit which is capable of being computed in terms of money ; and

(ii) a question should have arisen about the amount of money due, or as to the amount at which such benefit should be computed.

These questions may be decided by the Labour Court as may be specified by the appropriate Government within a period not exceeding three months :

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit.

Therefore the Labour Court has jurisdiction to decide not only the right of a workman to receive from the employer any money or benefit capable of being computed in term of money but also the exact amount of it. However the provisions of this sub-section are subject to any rules made under this Act.

This sub-section should be construed so as to take within its fold a workman, who was employed during the period in respect of which he claims relief, even though he is no longer employed at the time of the application.[1] In other words the term "workman" includes all persons whose claim, requiring compensation under this sub-section, is in respect of an existing right arising from his relationship as an industrial workman, with his employer.

It was held in *Deepak Kumar* v. *Presiding Officer, Labour Court and others*,[2] that the Labour Court has jurisdiction in a proceeding under Section 33-C(2) to decide whether the applicant was a workman within the meaning of this Act.

In *Union of India* v. *O.P. Singh and others*,[3] a chowkidar posted to take care of vacant building claimed over-time wages by invoking Section 33-C(2). The claim was resisted by the Union of India on the ground that the Ministry of Defence is not an industry and the employees concerned are not workmen. It was held that the questions whether the department was industry and the employees were workmen and as such whether they are entitled for over-time wages has to be determined by a regular reference under Section 10(1). It is only an award given after such a reference which

1. *N.B. Corpn.* v. *Pritam Singh*, AIR 1972 SC 1579.
2. (1993) 2 Lab LJ 224 (P & H).
3. (1991) 1 Lab LJ 530 (Delhi).

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can be implemented by an application under Section 33-C(2) of the Act. A workman cannot make a claim under Section 33-C(2) of the Act in respect of a relief which was not based on an existing right and which could be appropriately the subject-matter of an industrial dispute requiring a reference under Section 10 of the Act.

In *Mysore S.R.T. Corpn., Bangalore* v. *S.K. Athani*,[1] the Mysore Road Transport Corporation consisted of employees from Bombay, Hyderabad and Mysore. The employees from Bombay and Hyderabad were getting higher rates of dearness allowance than those from Mysore. In consequence of an agreement between the corporation and its employees, orders were passed to pay increased dearness allowance and interim relief to the employees from Mysore and to those employees from Bombay and Hyderabad who opted for Mysore rates of dearness allowance. None of the Bombay and Hyderabad employees opted for these rates. Therefore they were held not entitled to increased dearness allowance and interim relief.[2]

Sub-section (1) deals with cases where money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A, while sub-section (2) deals with cases where a workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money.[3]

The claim to lay-off compensation of every workman who is laid-off is one which arises under the statute itself and Section 33-C provides for a benefit to the workman which is capable of being computed in terms of money under Section 33-C(2) of the Act. The mere fact that a large number of workers make a claim of the same nature against the employer does not change the nature of the dispute so as to take it out of the pale of Section 7 of the Act and render the dispute one which can only be dealt with by an Industrial Tribunal to which reference can be made by the appropriate Government.[4]

A Labour Court cannot under Section 33-C (2) award compensation which is any amount less than the basic wages and dearness allowance. If the lay-off could be held to be in accordance with the terms of the contract of service, no compensation could be allowed under this sub-section, while in a reference under Section 10 some compensation could be allowed even in such case.[5] In case of a dispute relating to claim for special allowance under the terms of a bipartite agreement between the parties, the Labour Court has jurisdiction to interpret the terms of that agreement while exercising its power under Section 33-C(2).[6]

In *Namor Ali* v. *C.I.W.T. Corpn.*,[7] the only dispute between the Management and a section of its workmen was whether the workmen were entitled to take advantage of a settlement. The quantum or rate of extra-wages to which the workman would be entitled under the settlement was not in dispute. The application under Section 33-C(2) would not be rejected on the ground that there is no dispute about money due. If the right to get the money on the basis of the settlement or the award is not established, no amount of money will be due. Therefore the question whether the workmen were entitled to take advantage of a settlement would attract the provisions of Section 33-C(2).

In *Vijay Prakash* v. *General Manager, Haryana Roadways Depot, Kaithal and*

1. AIR 1973 SC 2448.
2. *Mysore S.R.T. Corpn., Bangalore* v. *S.K. Athani*, AIR 1973 SC 2448.
3. *Nityanand M. Joshi* v. *Life Insurance Corporation of India*, AIR 1970 SC 90.
4. *R.B.B.A. Mills Co.* v. *Labour Court, Nagpur*, AIR 1972 SC 451.
5. *Workmen F.T. & R. Co.* v. *F.T. & R. Co.* AIR 1976 SC 1775.
6. *Central Bank* v. *S.K. Shaw*, AIR 1976 SC 929.
7. AIR 1978 SC 275.

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another,[1] the petitioner was employed as a conductor in the Haryana Roadways. He was not paid increments and he made a claim under Section 33-C(2) for the amount of wages not paid as increments. The department pleaded before the Labour Court that his increments were stopped and orders stopping increments were conveyed to him. These orders were still in force as they have not been set aside by any court of competent jurisdiction. It was held that the proceedings under Section 33-C(2) of the Industrial Disputes Act are in the nature of execution proceedings. The order passed by the Department stopping increments whether after hearing or without hearing the employee continued to be good order till the same was set aside by a court within the period of limitation. The order could be challenged before a proper forum on the ground that the same was void or contrary to the principles of natural justice or against the statutory rules. In the absence of these orders having been set aside by a competent court, the workman could not file a petition under Section 33-C (2) and the Labour Court could not exercise its powers and grant relief.

In *Upendra Chandra Chakraborty and Another* v. *United Bank of India*,[2] two employees of the United Bank of India working in Calcutta branch claimed customary bonus in an application under Section 33-C(2) on the ground that one month pay paid for the years 1959 to 1963, one and half months' pay paid for the year 1964 and two month's pay paid for the years 1965 to 1974 on the eve of pooja during September every year without any relation to profits developed into a condition of service and assumed the character of customary bonus. The Supreme Court while disposing of the civil appeal preferred by the workmen held that bonus paid by the bank does not satisfy the requirements laid down by the Court in the case of *Vegetable Products Ltd.* v. *Their Workmen*.[3] Payments made in the month of September or thereabouts every year by itself will not make the bonus paid a customary pooja bonus. Rate of payment has not been uniform. Such payments were made pursuant to the demand of the employees and bonus paid related to profits. No bonus was paid from 1950 to 1958. There was no evidence to show that bonus was paid even in a year of loss.

The Court further held that concept of customary bonus is unknown to Nationalised banks. All the Nationalised banks including the respondent are wholly owned undertakings of the Government of India. In the matter of bonus the employees of all the Nationalised banks must be dealt with on a common denominator. Acceptance of the contention of the employees would result in undeserved advantage of the employees in one of the Nationalised bank compared to their counter-parts in other Nationalised bank and even in other branches of the same bank and may cause disharmony and inequality. Hence in larger public interest the demand for customary bonus must be negatived.

Proceedings under Section 33-C(2) are analogous to execution proceedings and Labour Court called upon to compute benefits claimed by a workman is in the position of an executing Court and as such competent to interpret an award where there is a dispute as to the right thereunder or as to its correct interpretation.[4] However, where the award is unambiguous the Labour Court cannot in the guise of interpreting it, make a new award by adding to or substracting anything from it. When an employee, a clerk of a bank, was entrusted with supervision work and was accorded the status of a person competent to discharge functions of a supervisory character he was entitled to supervisory allowance.[5] A proceeding under Section 33-C (2) is a proceeding, generally

1. (1995) 2 Lab LJ 1039 (P & H).
2. (1985) 2 LLJ 398 (SC).
3. (1965) 1 LLJ 468.
4. *Voltas Ltd.* v. *J.M. Demello*, AIR 1971 SC 1902.
5. *State Bank, Bikaner* v. *Hari Har Nath*, AIR 1971 SC 2200.

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in the nature of an execution proceeding wherein the Labour Court calculates th amount of money due to a workman from his employer or computes the benefits, t which a workman is entitled, in terms of money.[1]

The Labour Court has jurisdiction to entertain a petition under Section 33-C(2) fc the minimum wage due to an employee under the Minimum Wages Act. The existenc of any other remedy for determination and recovery of minimum wage or minimur bonus does not bar the jurisdiction of the Labour Court to entertain a petition unde Section 33-C(2). In the course of such determination, the Labour Court has jurisdictio to decide all questions incidental thereto and award such amount as the employee i found entitled to. The mere denial of the statutory right of any objection on the part o the employers to the jurisdiction of the Labour Court to entertain such petition is therefore, untenable.[2]

An application for Payment of Gratuity cannot be made under Section 33-C(2) o the Act. Any such proceedings must be initiated under the Payment of Gratuity Act.[3]

In *M/s. R.L. Kalathia & Co.* v. *State of Gujarat*,[4] it was held that recovery applications under Section 33-C(2) for dues under the Minimum Wages Act are maintainable. Even though the Minimum Wages Act, may have separate enforcemen machinery, but in the absence of any express or implied exclusion of the jurisdiction o the Labour Court under Section 33-C (2), application for recovery of dues under the Ac are maintainable under Section 33-C(2). In this connection it cannot be said that the Minimum Wages Act is such a complete code that it excludes jurisdiction of the Labour Court under Section 33-C(2).

In *Hari Mohan Rastogy* v. *Labour Court*,[5] the appellant was employed as Town-in-charge. His services were terminated with effect from December 31, 1967 Later on he was re-employed as Sub-station Assistant with effect from December 4. 1968. Since conditions precedent to retrenchment were not complied retrenchment was held to be illegal. The Court also ordered payment of back wages after giving credit to the amount already paid. It was further held that in computing back wages payable to the employee, computation may be for both monetary and non-monetary benefits to which the employee is entitled.

In *Goverdhan Prasad* v. *The Management of M/s. Indian Oxygen Ltd.*,[6] some dearness allowance formula was decided by the Industrial Tribunal in respect of the workmen employed in the factory including the General Staff. Some of the employees who were stationed at Ghaziabad also claimed dearness allowance as per award. It was held that the award would apply to staff at Ghaziabad as well because for all practical purposes they were under general superintendence and administrative control of Delhi Branch. Ghaziabad is hardly at a distance of about 20 Km. from Delhi and the price structure prevalent in Delhi and Ghaziabad are not materially different.

In *Sudhir Chandra Sarkar* v. *Tata Iron and Steel Co. Ltd. and others*,[7] the payment of gratuity has been express or statutory condition of service under certified standing orders and the rules of gratuity of the establishment. On these facts it was held that the employer is bound to pay gratuity on retirement of an employee.

The Court further held that so far as the jurisdiction of the Civil Court in this matter is concerned it is determined by the nature of the relief claimed. If the relief

1. *C.I.W.T. Corpn.* v. *Workmen*, AIR 1974 SC 1904.
2. *Annand Oil Industries* v. *Labour Court, Hyderabad*, AIR 1979 AP 182.
3. *State of Punjab* v. *Labour Court, Jullundhar*, (1981) 1 LLJ 354 (SC).
4. (1990) Lab IC 1818 (Guj).
5. (1984) 1 LLJ 32 (SC).
6. (1984) 2 LLJ 26 (SC).
7. (1984) 2 LLJ 223 (SC).

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claimed is monetary decree of enforcing statutory conditions of service, the Civil Court would certainly have jurisidction to grant the relief. Right to payment of gratuity on completion of prescribed period of service is a condition of service. Its breach would give rise to civil dispute and civil suit would be the only remedy. In the case of the workmen governed by the Industrial Disputes Act, 1947, Section 33-C(2) may provide an additional forum to recover monetary benefit.

In *Rameshwar Manjhi (deceased) Through his son Lekhiram Manjhi* v. *Management of Sangramgarh Colliery and others*,[1] it was held that the applicability of the *maxim actio persona moritur cum persona* depends upon the relief claimed and the facts of each case. By and large the industrial disputes under Section 2-A of the Act relate to the termination of services of the concerned workman. In the event of death of a workman during pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted, but the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of the other workmen in the industry. Primary object of the Act is to bring industrial peace. It is therefore in conformity with the scheme of the Act that the proceedings in such cases should continue at the instance of the legal heirs or representatives of the deceased workman. Therefore the death of the workman during pendency of the proceedings can not deprive the heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman.

Section 33-C(3).—This sub-section provides that the Labour Court while acting under sub-section (2) may if it so thinks fit, appoint a Commissioner for the purpose of computing the money value of a benefit. The Commissioner shall, after taking such evidence as may be necessary, submit a report to the Labour Court. Then the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case. Provision is made regarding the appointment, power and procedure of such Commissioner in Rules 63 to 70 of the Industrial Disputes Act, 1947.[2]

Section 33-C(4).—The Labour Court shall forward its decision regarding the amount of money due or the amount at which the benefit should be computed to the appropriate Government. Any amount found due by the Labour Court may be recovered in the manner provided for in sub-section (1) as an arrear of land revenue.

Section 33-C(5).—This sub-section enables any number of such workmen, employed under the same employer, as are entitled to receive from the employer any money or any benefit capable of being computed in terms of money, to take a single application for the recovery of amount due on behalf of or in respect of any number of such workmen. But any such application may be made subject to the rules made in this behalf by the appropriate Government.

Explanation.—The expression "Labour Court" for purposes of this section includes not only a Labour Court constituted under Section 7 of this Act, but any Court constituted under any law relating to investigation and settlement of industrial disputes in force in any State.

Money due.—Money due means money which has been ascertained and become payable. It is not essential that the claim which can be brought before the Government or its delegate under Section 33-C(1) must always be for a predetermined sum.[3] Therefore a claim for lay-off under Chapter V-A of Act, is a claim for money due.[4] The Government or the Labour Court may satisfy itself about the exact amount and then take

1. (1994) 1 LLJ 376 (SC).
2. The Industrial Disputes (Central) Rules, 1957.
3. *Sovaram Rigam Digital Mills Co. Ltd.* v. *Baliram Ukandaji* (1956) I LLJ 41 (SC).
4. *Ibid.*

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action under Section 33-C(1).[1]

Recovery certificate.—The appropriate Government may issue recovery certificate if it is satisfied that money is due to a workman. Before issuing a recovery certificate the Government must afford an opportunity to the party against whom recovery certificate is issued to plead his case ; failure to do so would render the certificate invalid.[2]

Who can make an application.—An application can be made by or on behalf of a workman as provided in Section 33-C(1). Even a discharged or dismissed workman may make an application,[3] for it is not necessary that the workman making application should be in service on the date on his application but he must have been in service during the period in respect of which claim is made.[4] If a workman was not in service at the time of a dispute in reference to which a settlement or an award entitling him to any money or benefit was given, he will not have a claim under Section 33-C(2) of the Act.

Jurisdiction of the Labour Court under sub-section (2).—The scope of the jurisdiction of a Labour Court under sub-section (2) is in certain respects wider than sub-section (1). The case of a workman, who claims that the benefit to which he is entitled would be computed in terms of money, is covered by sub-section (2), even though the right to the benefit on which his claim is based is disputed by the employer.[5] The Labour Court has a right to interpret an award or settlement which forms the basis of the workman's right. This sub-section is not limited to claims arising under an award, settlement or Chapter V-A of the Act. However, the following were held to be outside the purview of sub-section (2), namely[6] :—

(i) Cases which can be adjudicated under Section 10(1) of the Act ; and

(ii) Claims which have already been subject-matter of settlements to which sections 18 and 19 apply.

Where a claim is based on an award or settlement is made, the Labour Court may consider the plea that the award is given without jurisdiction.[7] The Labour Court may also determine a dispute relating to the right of a workman to receive benefit.[8] The right to the benefit which is sought to be computed must be an existing one, which means a right already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between a workman and his emplyer.[9] If the Labour Court is satisfied that a direction to the award which is basis of the claim of a workman is without jurisdiction, it may refuse to implement it.[10]

It was held in *Union of India and another* v. *S.B. Agnihotri and another*,[11] that the Labour Court has got jurisdiction to award interest at the rate of 18 per cent on the amount unlawfully withheld. No period of limitation is prescribed for making an application under Section 33-C(2). High Court cannot interfere with the award of interest under Article 226 of Constitution of India.

In *S.S. Shandhu* v. *Fertilizer Corporation of India*,[12] the corporation made *ex*

1. *Sawatram Ramprasad Mills Co. Ltd.* v. *Baliram Ukandaji*, (1956) 1 LLJ 41 (SC).
2. *Velayudhan (M.)* v. *State of Kerala*, (1969) 1 LLJ 319 (Kerala).
3. *Tiruchi Srirangam Transport Co.* v. *Labour Court*, (1968) 1 LLJ 729 (Mad).
4. *M. Manicka Mudaliar* v. *Labour Court*, (1961) 1 LLJ 592 (Mad).
5. *Central Bank of India Ltd.* v. *Rajagopalan*, (1968) 2 LLJ 89 (SC).
6. *Central Bank of India Ltd.* v. *Rajagopalan*, (1968) 2 LLJ 89 (SC).
7. *East India Coal Co. Ltd.* v. *Rameshwar*, (1968) 1 LLJ 6 (SC).
8. *Central Bank of India Ltd.* v. *Rajagopalan*, (1968) 2 LLJ 89 (SC).
9. *East India Coal Co. Ltd.* v. *Rameshwar*, (1968) 1 LLJ 6 (SC).
10. *Bombay Gas Co. Ltd.* v. *Gopal Bhiva*, (1963) 2 LLJ 608 (SC).
11. (1991) 2 Lab LJ 603 (All).
12. AIR 1974 SC 1987.

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gratia payment to its workmen in 1964-65. After coming into force of the Payment of Bonus Act, 1965, a Cabinet decision was taken that public sector undertaking which had made *ex-gratia* payments should continue to make such payments. The Corporation introduced production bonus Scheme. Workers were given a choice either to opt for bonus payable according to Cabinet decision or statutory bonus plus production bonus according to the scheme formulated by the Corporation. They opted for Cabinet decision and later on claimed the production bonus as well. It was held that their claim was not justified and the amount of production bonus paid to them was liable to be taken into account in computing bonus payable to them under the Cabinet decision.

Money or benefit capable of being computed in terms of money.—The word 'benefit' under this sub-section means all kinds of benefit whether monetary or non-monetary to which a workman is entitled.[1] Where reinstatement of a workman is ordered under the terms of an award, he can ask for a computation, in terms of money, of the benefit to reinstatement, if the order of reinstatement was not implemented by the employer. While computing the benefit of reinstatement the Tribunal has to take into consideration the date from which the reinstatement was ordered and many other factors, such as the terms and conditions of employment, the tenure of service, the possibility of termination of employment at the instance of either the employer or the workman and the possibility of retrenchment by the employer.

Limitation period for making application.—No limitation under sub-section (2) is prescribed for making an application. In the absence of any provision of law prescribing the limitation, a period of limitation cannot be provided by judicial legislation.[2]

In *Nanoo Ram* v. *Mahesh Chandra*[3] the Supreme Court held that the Labour Court was justified in rejecting the application of the workman under Section 33-C(2) claiming certain allowances and other benefits on reinstatement on the ground of laches, the claim having been filed six years after the award of reinstatement.

Application under sub-section (2) and alternate remedy.—The right to make an application under Section 33-C(2) does not bar the jurisdiction of a Civil Court,[4] and the availability of an alternative remedy is no bar to an application under Section 33-C(2) of the Act. Similarly jurisdiction of an authority under Section 15 of the Payment of Wages Act is no bar to entertaining a claim under this sub-section.[5] The alternative remedies are independent of each other.[6] But if a remedy is claimed under either of the Acts and fails on merits, an alternative claim is barred before another authority or Court.[7] A decision given under Section 33-A by Labour Court of competent jurisdiction on the question whether a person was workman or not bars reagitation of the same issue between the same parties on the principles of *res judicata*.[8]

Similarly, a remedy provided under Section 33-C(2) does not take away the right of the Government under Section 10 of the Act to refer the matter if circumstances so justify.[9] An aggrieved workman may claim an alternative remedy either under Section 33-C(2) or under Section 10 of the Act.[10] Where a claim is made by an employee, the

1. *Punjab National Bank Ltd.* v. *Kharbanda*, (1962) 1 LLJ 234 (SC).
2. *State Bank of Bikaner* v. *C.S. Verma*, (1968) 1 LLJ 840 (SC).
3. (1990) SCC (Suppl) 752.
4. *Rivers Steam Navigation Co. Ltd.* v. *Indian Steam Navigation Workers Union*, (1964) 1 LLJ 98 (Cal).
5. *Uttam Chand* v. *Kartar Singh*, (1967) 1 LLJ 23 (Punjab).
6. *Ambica Mills Ltd.* v. *Second Labour Court*, (1967) 2 LLJ 890 (Guj).
7. *G.K. Iypunny* v. *Madhu Sudan Mills*, (1964) 1 LLJ 197 (Bom).
8. *Punjab Co-op. Bank Ltd.* v. *R.S. Bhatia*, AIR 1975 SC 1898.
9. *Workers of Thambi Motor Service* v. *Thambi Motor Service*, (1969) 1 LLJ 497 (Mad).
10. *Navashakti Publishing Co. Ltd.* v. *State of Bihar*, (1964) 2 LLJ 198 (Pat).

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burden lies upon him to establish the facts and circumstances by adducing sufficient evidence in support of his claim. Where a petition of claim is prescribed, but is dismissed for want of evidence in support of such a claim the dismissal would operate as *res-judicata* to any future claim in respect of the same matter.[1]

Labour Court as specified by the appropriate Government.—As provided in sub-section (2), the jurisidction under this sub-section can only be exercised by a Labour Court specified in this behalf, which means the appropriate Government has to specify the Labour Court which may exercise the jurisdiction under this section and no other Labour Court has jurisdiction to proceed under these provisions.[2] Mere general specification would be sufficient to designate a Labour Court for the purposes of computing the money value of the benefit claimed by the workman.[3] It is after such specification by the appropriate Government that the jurisdiction under Section 33-C(2) of the Act may be exercised.[4]

Jurisdiction of Civil Court in relation to Industrial disputes.—In the *Rajasthan State Road Transport Corpn.* v. *Krishna Kant and others*,[5] the Supreme Court considered several decisions relating to the jurisdiction of Civil Court in relation to Industrial Disputes Act and summarised the principles as follows :

(1) Where the dispute arises from general law of contract, *i.e.*, where reliefs are claimed on the basis of the general law of contract, a suit filed in Civil Court cannot be said to be not maintainable even though such a dispute may also constitute an "Industrial Dispute" within the meaning of Section 2K or Section 2A of the Industrial Disputes Act, 1947.

(2) Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.

(3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations, created by enactment like Industrial Employment (Standing Orders) Act, 1946—which can be called "sister enactments" to Industrial Disputes Act—and which do not provide a forum for resolution of such dispute, the only remedy shall be to approach the forums, created by the Industrial Disputes Act, provided they constitute Industrial Disputes within the meaning of Section 2(K) and Section 2-A of Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an Industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act, otherwise recourse to Civil Court is open.

(4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate government. The power to make a reference conferred upon the government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make reference unless, of course, the dispute raised is a totally frivolous on *ex facie*.

(5) Consistent with the policy of law aforesaid, we commend to the Parliament and the State Legislature to make a provision enabling a workman to approach the Labour Court./Industrial Tribunal directly *i.e.*, without the requirement of a reference by the Government—in case of Industrial Dispute covered by Section 2-A of the Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

1. *Upendra Subhanna Prabhu* v. *First Labour Court, Bombay* (1956) 2 LLJ 405 (Bom).
2. *Triegi Nath* v. *Indian Iron and Steel Co. Ltd.*, (1968) 1 LLJ 1 (SC).
3. *Ibid.*
4. *Triegi Nath* v. *Indian Iron and Steel Co. Ltd.* (1968) 1 LLJ 1 (SC).
5. (1995) 1 LLJ 798 (SC).

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(6) The certified standing orders framed under and in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to "statutory provisions". Any violation of these standing orders entitles an employee to appropriate relief either before the forums created by the Industrial Disputes Act or the Civil Court where recourse to Civil Court is open according to the principles indicated herein.

(7) The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and un-encumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to Civil Courts. Indeed the powers of the Courts and Tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an Industrial Dispute.

Section 34. Cognizance of offences.—Section 34(1) enacts that a Court shall take cognizance of any offence punishable under this Act or of the abetment of any such offence, if a complaint to that effect is made either :

(i) by the appropriate Government, or

(ii) under the authority of the appropriate Government.

Sub-section (2) provides that any Court inferior to the Court of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall not try any offence punishable under this Act.

Under sub-section (2) the appropriate Government may itself make a complaint or may delegate its power to some authority to make a complaint. The discretion vested under this section in appropriate Government either to make a complaint itself or authorise some one else in that behalf is like the discretion of a private person to file a complaint and may be based purely on grounds of expediency.[1] The expression under the authority of the 'appropriate Government' means a sanction by the Government after it has considered the desirability of prosecution ; does not lay much emphasis on the identity of the officer who has made the complaint.[2]

Section 35. Protection of persons.—(1) No person refusing to take part or to continue to take part in any strike or lock-out which is illegal under this Act shall, by reason of such refusal or by reason of any action taken by him under this section, be subject to expulsion from any trade union or society, or to any fine or penalty, or to deprivation of any right or benefit to which he or his legal representatives would otherwise be entitled, or be liable to be placed in any respect, either directly or indirectly, under any disability or at any disadvantage as compared with other members of the union or society, anything to the contrary in the rules of a trade union or society notwithstanding.

(2) Nothing in the rules of a trade union or society requiring the settlement of disputes in any manner shall apply to any proceeding for enforcing any right or exemption secured by this section, and in any such proceeding the Civil Court may, in lieu ordering a person who has been expelled from membership of a trade union or society to be restored to membership, order that he be paid out of the funds of the trade union or society such sum by way of compensation or damages as that Court thinks just.

Section 36. Representation of parties.—(1) A workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by—

(a) any member of the executive or other officer bearer of a registered trade

1. *Ramdas v. K.M. Sen*, (1956) 2 LLJ 323 (Cal).
2. *Public Prosecutor v. S.A. Jabbar*, (1966) 2 LLJ 88 (Mad).

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Government, as may be specified in the notification ; and

(b) where the appropriate Government is a State Government, by such officer or authority subordinate to the State Government as may be specified in the notification.

Section 40. Power to amend Schedules.—(1) The appropriate Government may, if it is of opinion that it is expedient or necessary in the public interest so to do, by notification in the Official *Gazette*, add to the First Schedule any industry, and on any such notification being issued, the First Schedule shall be deemed to be amended accordingly.

(2) The Central Government may, by notification in the Official *Gazette* add to or alter or amend the Second Schedule or the Third Schedule and on any such notification being issued, the Second Schedule or the Third Schedule, as the case may be, shall be deemed to be amended accordingly.

(3) Every such notification shall, as soon as possible after it is issued, be laid before the Legislature of the State if the notification has been issued by a State Government, or before Parliament, if the notification has been issued by the Central Government.

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THE INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

CHAPTER I
PRELIMINARY

Introduction.—The absence of Standing Orders in establishment very often led to friction between the management and workers in industrial undertakings in our country. Before passing of this Act the conditions of employment were governed by contracts either express or implied between the employers and their employees in different industrial undertakings. In many cases these conditions were not well defined and suffered from doubt and ambiguity.

With the advent of Trade Unionism and collective bargaining new problems of maintaining industrial peace and production for the society were created. It was then considered that the society had a vital interest in the settlement of terms of employment of industrial labour and thus the settlement of labour problems became tripartite and the State, representing the society entered on the scene.[1]

The importance of making a law defining precisely the conditions of employment was emphasised during discussions in the Tripartite Labour Conferences. To give effect to the new ideology the Industrial Employment (Standing Orders) Act, 1946 was enacted by the Central Government. It is obligatory upon all the employers covered by this Act to define conditions of employment under them. The conditions of employment must also be made known to workmen employed by such employers. The Preamble of the Act makes it amply clear that the Standing Order shall deal with the "conditions of employment of workers in industrial establishment". These words are wide enough to include acts which may be committed even out of the factory premises.[2] The object of the Act is to regulate the conditions of recruitment, discharge, disciplinary action, holidays etc., of the workers employed in industrial undertakings. The Act has also introduced uniformity of terms and conditions of employment in respect of workmen belonging to the same category and discharging the same or similar work in an industrial establishment.[3]

Sec. 1. Application of the Act.—The object of the Standing Orders is to make it clear to both the parties on what terms and conditions the workmen are offering to work and the employer is offering to engage them. This Act requires the employers to define the conditions of service in their establishments and to reduce them to writing and to get them compulsorily certified with a view to avoid unnecessary industrial disputes.[4] The Act applies to every industrial establishment :—

(1) situated within the Indian Union, except the State of Jammu and Kashmir ;

(2) employing 100 or more workmen on any day of the preceding 12 months.

1. *Western India Match Co.* v. *Workmen*, A.I.R. 1973 S.C. 2650.
2. *The Aluminium Industries Employees' Union* v. *Aluminium Industries Ltd.*, A.I.R. 1963 Orissa 169.
3. *Salem Erode Electricity Distribution Company (Pvt.) Ltd.* v. *Employees' Union*, A.I.R. 1966 S.C. 808.
4. *Shahadara S. Light Railway Co.* v. *S.S. Railway Workers Union*, A.I.R. 1969 S.C. 513.

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The appropriate Government may by a Gazette notification apply the Act to any Industrial establishment employing such number of persons as specified in the notification. The number of employees fixed by the Government may be less than 100. But the Appropriate Government must give two months' prior notice of its intention to make any such extension of the Act.

The Act does not apply to the following establishments :—

(1) Any industry to which the provisions of Chapter VII of the Bombay Industrial Relations Act, 1946 apply ;

(2) Any industrial establishment to which the provisions of the M.P. Industrial Employment (S.O.) Act, 1961 apply :

Provided that notwithstanding anything contained in the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, the provisions of this Act shall apply to all industrial establishments under the control of the Central Government.

It was held in *Avery India Ltd.* v. *Second Industrial Tribunal, West Bengal*,[1] that the provisions as to the age of retirement in the standing orders of an establishment would apply to all employees irrespective of whether they entered into service prior to or subsequent to the coming into force of the standing orders and even though there was no such provision for retirement in the past.

In absence of any standing orders or rules, law of master and servant governs relationship between employees and employer.[2] When the employer chooses to provide sick leave under the Standing Orders which in view of the preamble of the Act is really a part of the conditions of service by which the employer is bound, the Standing Order confers on the employee as a matter of contract the right to sick leave.[3] The employee can exercise his right and the employer cannot require him to seek the sickness benefit under the Employees' State Insurance Act.

Sec. 13-B. Act not to apply to certain industrial establishments.—The Act does not apply to such workmen employed in any industrial establishment as are covered by the following rules and regulations :—

(1) The Fundamental and Supplementary Rules ;
(2) The Civil Service (Classification, Control and Appeal) Rules ;
(3) The Civil Services (Temporary Service) Rules ;
(4) The Revised Leave Rules ;
(5) The Civil Services Regulations ;
(6) The Civilians Defence (Classification, Control and Appeal) Service Rules ;
(7) The Indian Railway Establishment Code ; or
(8) Any other Rules or Regulations that may be notified in this behalf by the appropriate Government in the Official Gazette.

Evidently these rules do not apply to industrial establishment under private management or under the management of a statutory Corporation. The Appropriate Government may extend the Act to any class or classes of industrial establishments as it deems fit.

In *U.P.S.E. Board* v. *Hari Shanker*,[4] the two workmen were originally employed by Messrs Seth Ram Gopal and partners who were licensees for the distribution of electricity. The certified standing orders of this company did not prescribe any age of superannuation for the employees. This undertaking was later on purchased by the U.P. State Electricity Board with effect from 15-12-1964 and thereafter its employees became

1. A.I.R. 1972 S.C. 1626.
2. *Management of M.I.S. Shiva Flour Mills, Bhagalpur* v. *Workmen*, A.I.R. 1970 Pat. 273.
3. *M.L. Kantarao* v. *Azam Jahi Mills Ltd. Warangal*, 1970 Lab. I.C. 585 (A.P.).
4. A.I.R. 1979 S.C. 65.

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the employees of U.P.S.E. Board. The Board, to which the Industrial Employment (Standing Orders) Act, 1946 applies, neither made nor got certified any standing orders but considered the certified standing orders of the establishment of Messrs Seth Ram Gopal and Partners as applicable to the Employees even after the purchase of the undertaking by the Board. On May 28, 1970 the Governor of U.P. by a Gazette notification issued under section 13-B of the Industrial Employment (Standing Orders), Act, 1946 prescribed the age of retirement of the employees of the Electricity Board. The two workmen were retired by the Board in pursuance of this notification with effect from July 2, 1972 and July 7, 1972 respectively. The respondents thereupon filed a writ petition challenging the regulation as valid and effective. The Court observed that the Industrial Employment (Standing Orders) Act is a special law in regard to the matters enumerated in the Schedule and the regulations made by the Electricity Board under the Electricity (Supply) Act with respect to any of those matters are of no effect unless such regulations are either notified by the Government under section 13-B or certified by the Certifying Officer under section 5 of the Industrial Employment (Standing Orders) Act, 1946. The Industrial Employment (Standing Orders) Act, 1946 deals with a specific subject, namely, the conditions of service enumerated in the Schedule, of workmen in industrial establishment. Therefore, the provisions of the Standing Orders Act must prevail over section 79 (c) of the Electricity (Supply) Act in regard to matters to which the Standing Orders Act applies.

It was further held in this case that the expression "workmen to whom any other rules or regulations that may be notified in this behalf" means in the context of section 13-B workmen enjoying a statutory status in respect of whose conditions of service the relevant statute authorises the making of rules or regulations. The expression cannot be construed so narrowly as to mean Government servants only, nor can it be construed so broadly as to mean workmen employed by whomsoever including private employers, so long as their conditions of service are notified by the Government under section 13-B.

Sec. 14. Power to exempt.—Section 14 of the Act authorises the appropriate Government to exempt conditionally or unconditionally any industrial establishment or class of industrial establishments from all or any of the provisions of this Act.

But the question that arose before the Court in *Raman Nambisan* v. *Madras State Electricity Board*,[1] was whether the power to exempt any industrial establishment would include the power to exempt a section of the industrial establishment also. It was held that : "Section 14 enables the Government to exempt any Industrial establishment or class of establishments from all or any provisions of the Act and not a section of the industrial establishment."

Special features of the Act.—The following are some of the main features of the Industrial Employment (Standing Orders) Act, 1946 :—

(1) The employer of every industrial establishment to which the Act applies is required to frame draft Standing Orders and to submit them to the Certifying Officer, who is generally the Labour Commissioner, for certification ;

(2) The definition of workmen under this Act includes a "Supervisory Technical Personnel" under certain conditions ;

(3) The certifying officer is empowered to modify or add to the draft Standing Orders so as to render them certifiable under the Act ;

(4) A group of employers of similar industrial establishments may submit joint Standing Orders for certification ;

(5) The Government may by rules set out model Standing Orders for the purposes of this Act. The Draft Standing Order framed by an employer

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1. (1967) 1 L.L.J. 252 (Mad).

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should as far as practicable be in conformity with the Model Standing Orders ;

(6) This Act normally applies to every industrial establishment wherein one hundred or more workmen are employed ;

(7) The certifying officers and appellate authorities shall have all the powers of a Civil Court in respect of certain matters provided in section 19 of the Act ;

(8) The employer can be penalised for failure to submit draft Standing Order for certification or for contravention of any provision of the Standing Order finally certified ;

(9). The appropriate Government may by a Gazette notification exempt any establishment or class of industrial establishments from any of the provisions of the Act ;

(10) The appropriate Government may after previous publication by notification in the Official Gazette, make rules to carry out the purposes of this Act.

Sec. 2. Interpretation—(a) Appellate authority.—Appellate authority means an authority appointed by the appropriate Government by notification in the Official Gazette to exercise, in such area as may be specified in the notification, the functions of an appellate authority under this Act.

But in relation to an appeal pending before an Industrial Court or other authority immediately before the commencement of the Industrial Employment (Standing Orders) Amendment Act, 1963, that Court or authority shall be deemed to be the appellate authority.

(b) Appropriate Government.—The Central Government is deemed to be the appropriate Government in respect of the following industrial establishments :

(a) an establishment under the control of the Central Government ; or

(b) Railway administration ; or

(c) establishment in a major port, mine, or oilfield.

In all other cases appropriate Government means State Government.

Proviso added by the Amendment Act of 1982 provides that where any question arises as to whether any industrial establishment is under the control of the Central Government, that Government may either on a reference made to it by the employer or the workmen, or a trade union or other representative body of the workmen or on its own motion and after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties.

(c) Certifying Officer.—The following are said to be certifying officers under this Act :

(1) A Labour Commissioner ; or

(2) A Regional Labour Commissioner ; or

(3) Any other officer appointed by the appropriate Government, by notification in the Official Gazette, to perform all or any of the functions of a certifying officer under this Act.

(d) Employer.—The expression 'employer' means the owner of an industrial establishment to which this Act for the time being applies. It also includes :

(1) in a factory, any person named under clause (f) of sub- section (1) of section 7 of the Factories Act, 1948, as manager of the factory ; or

(2) in an industrial establishment under the control of any department of any Government in India, the authority appointed by such Government, in this behalf or where no authority is so appointed the head of department ; or

(3) in any other industrial establishment, any person responsible to the owner

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for the supervision and control of the industrial establishment.

(e) Industrial Establishment.—The expression industrial establishment means--

(1) an industrial establishment as defined in clause (ii) of section 2 of the Payment of Wages Act, 1936 ; or

(2) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 ; or

(3) a railway as defined in clause (4) of section 2 of the Indian Railways Act, 1890 ; or

(4) the establishment of a person who for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen.

In *Karantaka Agro Industries Corporation Employees' Association* v. *State of Karnataka*,[1] the Karnataka Agro-Industries Corporation, a Government Company has five workshops governed by the Factories Act in different parts of the State of Karnataka. It has an administrative office attached to one workshop and the majority of the workmen are working in the administrative office and 150 workmen are working in the workshops. Service rules framed by the Board of Management are enforced without framing certified Standing Orders. A writ petition was filed for direction not to enforce the service rules introduced by it unilaterally. It was held that the five workshops of the Agro-Industries Corporation are registered under the Factories Act and they employ more than 100 workmen and they come under the definition of the term Industrial Establishment covered by Industrial Employment (Standing Orders) Act. By applying the principle of functional integrality laid down by the Supreme Court in *Associated Cement Co. Ltd.* v. *Their Workmen*,[2] the Corporation is an Industrial Establishment governed by the Act. It is, therefore, obligatory on its part to comply with sections 3, 4 and 5 of the Act. It cannot, therefore, bind the workmen to the Service Rules unilaterally prescribed by its Board of Management. Consequently Model Standing Orders will be applicable to the workmen till the certified Standing Orders are brought into force.

It was held in *K. Thiruvenkataswami* v. *Coimbatore Municipality*,[3] that the Electricity Department of Municipality is an 'industrial establishment' and also that the Act and the model Standing Orders framed thereunder apply to a person who is an employee of that department.[4]

The Standing Orders Act being a special Act relating to the service conditions of persons employed in industrial establishments, its provisions will prevail over the provisions of the District Municipalities Act or the rules framed by the State Government under section 74 of that Act.

(f) Prescribed.—'Prescribed' means prescribed by rules made by the appropriate Government under this Act.

(g) Standing Orders.—The expression "Standing Orders" means rules relating to matters set out in the Schedule of this Act. The following matters should according to the Schedule be provided in Standing Orders under this Act :

(1) Classification of workmen, *e.g.*, whether permanent, temporary, apprentice, probationers, or *badlis*.

(2) Manner of intimating to workmen periods and hours of work, holidays, pay days and wage rates.

1. (1987) 2 Lab. L.J. 62 (Karn.).
2. (1960) 1 Lab. L.J. 1 (S.C.).
3. (1968) 1 L.L.J. 361 (Mad.).
4. *S. Bhagiarathan* v. *Secretary to the Government of Tamil Nadu and others*, (1984) 2 L.L.J. 273 (Mad.).

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(3) Shift working.
(4) Attendance and late coming.
(5) Conditions of procedure in applying for and the authority which may grant leave and holidays.
(6) Requirement to enter premises by certain gates, and liability to search.
(7) Closing and reopening of sections of the industrial establishment, and temporary stoppages of work and the rights and liabilities of the employer and workmen arising therefrom.
(8) Termination of employment and the notice thereof to be given by employer and workmen.
(9) Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
(10) Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servant.
(11) Any other matter which may be prescribed.

It shall be obligatory upon the employer to make provision in the Standing Orders in respect of any matter provided in the Schedule of the Act. Once a provision is made it can be modified only in accordance with the provision of section 10 (2) of the Act.

The word 'condition' in clause (5) of the Schedule has to be interpreted in a broad and liberal sense. The dictionary meaning of the word "condition" is a provision or a stipulation. Thus construed conditions of leave and holidays means a provision for the quantum of leave and holidays.

The expressions "termination of employment" and "notice thereof to be given by the employer and workmen" in clause 8 or the Schedule are to be read disjunctively. They comprise two distinct but connected matters and the latter does not qualify the former. Termination of employment would be the principal or primary subject, notice in relation thereto would form an ancillary or subsidiary subject. To read the entry as one part qualifying the other would leave a sizeable gap in the area which the Schedule is apparently intended to cover.[1]

It was held in *S.K. Ghosh* v. *Chairman O.S.E. Board*,[2] that the clause 'termination of employment' in item 8 of the Schedule and the word 'superannuation' cannot be equated. The former is a positive act by which one party, even against the desire of the other, can bring about the end to an employment, while the latter is an event which comes more or less in an automatic process. An age is fixed on the reaching of which the holder of an office is required to go out of office. There is no volition in the Act.

It was held in *New Victoria Mills Co. Ltd.* v. *Presiding Officer Labour Court*,[3] that the misconduct for which an employee may be dismissed need not necessarily have been committed in the course of his employment. Therefore, a workman employed as a sweeper who has either been proved to have committed a theft or to have so acted as to facilitate or aid theft may be guilty of such misconduct as to justify his dismissal. All that has to be shown is that the alleged misconduct affects the competence of the employee for the particular kind of work he does.

The act of misconduct which forms a basis for punishment must however, be one enumerated in the standing orders of the establishment. Punishment for an act which is not enumerated in the standing orders of the establishment is wholly illegal.[4]

1. *The Hindu Madras* v. *The Hindu office and National Press Employees' Union*, A.I.R. 1961 Mad. 107.
2. A.I.R. 1970 Orissa 126.
3. A.I.R. 1970 All. 210.
4. *Glaxo Industries (P) Ltd.* v. *Labour Court Meerut and others*, (1984) LLJ II Mad. 1625.

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In *Navinchandra Shakerchand Shah* v. *Ahmedabad Co-op. Ltd.*,[1] the petitioner who was a helper in the respondent society, was chargesheeted with over-weighing wheat to a customer and was dismissed from service after an inquiry. It was held that mere negligence is not misconduct. Mere lapse is not enough it must be a habitual negligence to constitute misconduct.

In *Suresh A. Kerkar* v. *S.V. Novagi Presiding Officer, Industrial Tribunal and others*,[2] the petitioner had extended his leave on medical grounds. During the time of such leave he was arrested by the police but was later discharged. His services were terminated on the ground that he suppressed the fact of his arrest and instead misrepresented the company by producing a false certificate that he was suffering from jaundice. He was examined by company's physician and the report did not confirm his illness from jaundice. It was held that merely securing a wrong or false medical certificate, by itself, does not amount to misconduct. The certificate of the doctor may be false due to ignorance or incompetence and therefore a wrong or false certificate does not necessarily create delinquency either on the doctor or on the person who produces it. As such the charge framed on this ground is bad. Secondly when a workman does not disclose his arrest to the company, it has nothing to do with the discipline in the premises of the establishment. Indeed the rules of discipline are meant to avoid unruly and disorderly behaviour of the employee within the working premises which is likely to affect the peaceful atmosphere and the smooth working of the establishment. Therefore the petition was allowed.

Where the standing order contemplates a notice to be given to the workman for the purpose of enabling him to show cause, within a specified period, against his dismissal, the notice must give a reasonable opportunity to the workman. That is a condition precedent which must be satisfied before an order of dismissal can be validly passed by the employer.[3]

The Standing Orders provide for giving opportunity to workers to offer explanation before imposing punishment of dismissal. It was held in *Associated Cement Companies Ltd.* v. *T.C. Srivastava and others*,[4] that neither under the ordinary law of the land nor under the industrial law a second opportunity to show cause against the proposed punishment is necessary. This does not mean that a Standing Order may not provide for it, but unless the standing order provides for it, either expressly or by necessary implication, no inquiry which is otherwise fair and valid will be vitiated by non-affording of such second opportunity.

Item 11 of the Schedule authorises the Government to add any other matter in the Schedule. Any matter added by the appropriate Government, shall be within its competence only if it relates to the conditions of employment.[5] Where a provision is made regarding the age of retirement in the Standing Orders of an establishment, it would apply to employees irrespective of the fact that they entered into service prior or subsequent to the coming into force of the Standing Orders and even though there was no such provision in the past.[6] Standing Orders framed after following the provisions of the Act bind even those employees who have entered into service before the framing of the Standing Orders inasmuch as such employees would be workmen employed at the

1. (1979) 1 L.L.J. 60 (Guj.).
2. (1996) 1 LLJ 675 (Bom).
3. *Laksmirattan Cotton Mills* v. *Workmen*, A.I.R. 1975 S.C. 1689.
4. (1984) 2 L.L.J. 105 (S.C.).
5. *The Hindu Madras* v. *The Hindu Office and National Press Employees' Union*, A.I.R. 1961 Mad. 107.
6. *Avery India Ltd.* v. *IInd Ind. Tribunal*, A.I.R. 1972 S.C. 1626 ; *Agra Electric Supply Co.* v. *Union*, A.I.R. 1970 S.C. 512 ; *S.E.E.D. Co.* v. *Their Employees' Union*, A.I.R. 1966 S.C. 808 and *U.P.E. Supply Co.* v. *P.N. Chatterjee*, A.I.R. 1972 S.C. 1201 followed.

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time when the Standing Orders are certified.[1]

The conditions of service for industries are generally laid down by Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1946. The conditions of employment can also be laid down in any other manner. The employer and employee may enter into special conditions of employment. In case of conflict between the statutory conditions of employment contained in Standing Orders and the special terms contained in the written contract, the terms of former shall prevail over the latter.[2] Such Standing Orders though binding between the employer and employees of industry, have no force of law to be binding on Industrial dispute.[3]

In *Free Wheels India Ltd.* v. *State of Haryana and others*,[4] the Standing Orders provided for automatic termination of employment on absence for eight consecutive days. A workman who abstained from duty for more than 8 days and later produced fitness certificate to join duty was terminated. It was held that in terms of the Standing Orders, the workman must be deemed to have left the service of the Company and his employment thereby automatically terminated. No doubt, it was open to the workman to seek conversion of his period of absence into leave without pay in terms of the Standing Orders but this could be done only if he offered an explanation for the absence to the satisfaction of the departmental head. No such explanation was ever offered or submitted by the workman. A certificate of fitness, without any thing more, cannot be said to amount to an explanation.

In *Pallavan Transport Corporation* v. *Appellate Authority under the Industrial Employment (Standing Orders) Act, Madras & others*,[5] it was held that the authority under the Act is entitled to fix the age of retirement at 58 years taking into account the comparative nature of the work discharged by the two classes of employees if it has come to the conclusion that the work is not so hazardous or arduous as to impair the workmen's serviceability or utility beyond 55 years. Dealing with compulsory retirement it held that the purpose for which compulsory retirement is retained in respect of Government servants is not the punishment but for the purpose of infusing efficiency in services. As far as Corporation is concerned, if it finds that any of its employees is unfit for discharging the duties, it has the necessary power of removal from service or discharge. Therefore there is no need for incorporating an additional arrangement by way of compulsory retirement.

Certified standing orders of the Hamdard Dawakhana by its clause 11 (4) provides that if an employee remains absent for 12 days beyond the period of leave originally granted, he shall lose his lien on the appointment. Clause 15-A (3) provides that absence from duty without permission and sanction of leave on rare occasions shall be treated as minor misconduct. In this case one Vishwanath applied for 3 days leave from 6th to 8th May 1974 and then extended it for another 3 days upto 11th May 1974 but did not turn up and on 24th May the management received a letter dated 21st May 1974 from the workman informing that on account of riots in Sadar Bazar he was arrested on 8th May and 25th May was fixed for his bail application. It was held that the two clauses of standing orders are independent and the management can treat the absence of the workman under either clause. Under clause 11 (2) sanction of leave is not material. If leave is applied for and not granted and the workman remains absent for 12 days, he loses his lien on the appointment. Sanction of leave is not essential for the applicability

1. *Dunlop India Ltd.* v. *Workmen*, A.I.R. 1972 S.C. 2326.
2. *Western India Match Co.* v. *Workmen*, A.I.R. 1973 S.C. 2650 ; *M/s. J.K. Cotton Manufactures* v. *J.N. Tiwari*, A.I.R. 1965 All. 639 overruled.
3. *Co-op. Cr. Bank* v. *Ind. Tri. Hyderabad*, A.I.R. 1970 S.C. 245.
4. (1984) 2 L.L.J. 77 (P. & H.).
5. (1979) 2 L.L.J. 262 (Mad.).

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of the penalty of losing lien on the appointment in case the workman remains absent for 12 days.[1]

In *Steel Authority of India Ltd. & another* v. *Dilip Kumar Debnath & others*,[2] the respondent an employee of the Steel Authority of India challenged his dismissal order. Standing Order 29 of the Steel Authority of India Ltd. authorised the disciplinary authority to terminate the services of an employee without holding any inquiry in appropriate case after recording reasons therefor. It was held that such a provision is reminiscent of the days of hire and fire and it is unfortunate that a public sector undertaking should keep such a provision in its standing orders. Appeal was, therefore, dismissed with permission to initiate disciplinary proceedings, if they so chose.

In *The Management of Ashok Leyland, Ltd., Madras* v. *Presiding Officer, III Additional Labour Court, Madras and Another*,[3] a semi-skilled worker was in the employment of Ashok Leyland Ltd. He absented himself without leave for more than 8 days continuously and he lost his lien of work on account of this absence. There was no such provision in the standing orders but there was a clause in a settlement which was supplemental to the Standing Orders providing for loss of lien. Further, the Labour Court found that he was absent with leave and therefore it held that standing orders will not get attracted. It was held that before terminating workmen reasonable opportunity should be given and any action in violation of principles of natural justice will offend Arts. 14 and 21 of the Constitution. It was further held that it is necessary for the employer to prescribe what should be the misconduct so that the workman knew the pitfall he could guard against. A clause 'any other act of misconduct' retained in the standing orders may give an authority to deal with a really recalcitrant employee whose misconduct does not fall in any other act or omission enumerated in standing orders but there is always a chance of it being abused by the employer. The employer is concerned with only such conduct of the employee which affects him or affects any condition of service of employees. Any anti-social act affecting public interest would be misconduct even though it is not directly connected with the work of the employer. There may be acts affecting the society at large and while affecting the society at large may be affecting the employer more. The employer is not barred from taking action in such cases.

Legal nature of Standing Orders or a contract can override Standing Orders.—The certified Standing Orders have a statutory force. The Standing Order implies a contract between the employer and the workman. Therefore, the employer and workman, cannot enter into a contract overriding the statutory contract as embodied in the certified Standing Orders.[4] While the Standing Orders are in force it is not permissible for the employer to seek their statutory modification so that there can be one set of Standing Orders in respect of certain employees and another for the rest.[5] Therefore, no workman can be appointed by the employer on conditions of service different from those defined in the Standing Orders, unless the Standing Orders are modified in accordance with the provisions of the Act. It is not open to an Industrial Tribunal to ignore an existing Standing Order of an industrial establishment in the matter of disputes concerning individual discipline.[6]

The Standing Orders duly certified become part of the statutory terms and govern

1. *Hamdard Dawakhana (WAQF) Delhi* v. *Labour Court Delhi and another*, (1985) 1 L.L.J. 67 (Delhi).
2. (1989) 1 Lab. L.J. 133 (Cal.).
3. (1995) 1 Lab. L.J. 887 (Mad.).
4. *Western India Match Co.* v. *Workmen*, A.I.R. 1973 S.C. 2650.
5. *Ibid.*
6. *Hoobows Lal Mahuteja & Sons (P.) Ltd.* v. *State of West Bengal*, (1964) 9 F.L.R. 59.

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all relations between the employer and the employees. They are binding on both the employers and the employees. To claim any exception to the said rule it has to be shown that the Standing Order is inconsistent with some operative provision of the Industrial Disputes Act. If it is proved, the provisions of the Act shall override the Standing Orders.

In *Behar Journals* v. *Ali Hasan*[1] the probation period provided by the Standing Orders was for 3 months only. But in the appointment letter of the respondent the period of probation was six months. It was held that the certified Standing Orders have statutory force. It is not possible in law for the parties to enter into contract overriding the Statutory Contract as embodied in the Standing Orders. Therefore, probationary period in this case could not be for a period longer than 3 months.

In *S.S. Light Railway Co.* v. *S.S. Railway Workers Union*[2] it was held by the Supreme Court :—

"The right to contract in industrial matters is no longer an absolute right and statutes dealing with industrial matters abound with restrictions on the absolute right to contract. The doctrine of hire and fire is completely abrogated both by statutes and by industrial adjudication, and even where the services of an employee are terminated by an order of discharge simpliciter the legality and propriety of such an order can be challenged in Industrial Tribunals. These restrictions on the absolute right to contract are imposed because security of employment is more and more regarded as one of the necessities for industrial peace and harmony and the contentment it brings about is a prerequisite of social justice. If reasons for discharging an employee are furnished to the employee concerned, he not only has the satisfaction of knowing why his services are dispensed with but it becomes easy for him in appropriate cases to challenge the order on the ground that it is either not legal or proper which in the absence of knowledge of these reasons, it may be difficult if not impossible for him to do."

(h) Trade Union.—Trade Union means a Trade Union for the time being registered under the Indian Trade Unions Act, 1926.

(i) "Wages" and "Workmen".—"Wages" and "Workmen" have the meaning respectively assigned to them in clauses (rr) and (s) of section (2) of the Industrial Disputes Act, 1947. Therefore, for detailed discussion about the meaning of these two words reference may be made to the relevant sections of the Industrial Disputes Act, 1947.

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1. A.I.R. 1959 Pat. 431.
2. A.I.R. 1969 SC. 513.

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CHAPTER II
STANDING ORDERS

Sec. 3. Submission of Draft Standing Orders.—(1) Within six months from the date on which this Act becomes applicable to an industrial establishment the employer of that establishment shall submit to the Certifying Officer five copies of the Draft Standing Orders proposed by him for adoption in his industrial establishment.

(2) The Draft Standing Orders must make provision for every matter, set out in the Schedule, which may be applicable to the industrial establishment. In those cases where Model Standing Orders have been prescribed the Draft Standing Orders shall be, so far as practicable, in conformity with such model.

(3) The Draft Standing Orders submitted under this section shall be accompanied by a statement giving prescribed particulars of the workmen employed in the industrial establishment. The name of the Trade Union, if any to which workmen belong, should also be sent along with the Draft Standing Orders.

(4) A group of employers in similar industrial establishments may submit a joint draft of Standing Orders under this Section provided they satisfy the conditions, if any, prescribed in this respect.

In *Hindustan Lever* v. *Workmen*,[1] the Standing Orders made provision for transfer of an employee from one department to another of the same establishment at the discretion of the Manager provided the terms and conditions of service are not affected. There was no finding that the transfer order was *mala fide* or vitiated by unfair labour practice. It was held that if the order of transfer is *prima facie* valid the burden of proving that it is invalid lie on the workmen and in the absence of any finding that the transfer order was *mala fide* or vitiated by unfair labour practice the award directing the reposting of the workman in his original department was bad.

In *S.K. Sheshadri* v. *H.A.L. and others*,[2] the validity of the Standing Order which made unduly lending in the company premises a misconduct was challenged as violative of Art. 14 of the Constitution. The said Standing Order was held not to be discriminatory. It was further held that as long as the Standing Orders fall within the Schedule to the Act, they would not be invalid or *ultra vires* because they contain additional provisions not provided for in the Model Standing Orders.

It was held in *U.P. State Sugar Corporation & Another* v. *Bipin Kumar Mishra*[3] that there is no requirement under the Act to frame standing order in respect of transfer, hence the employer cannot be denied the normal right to transfer an employee from one place to another. The employer cannot also be denied the right to frame rules and regulations relating to transfer of employees.

In *Sompal Singh* v. *Artificial Limbs Mfg. Corpn. of India*,[4] the draft Standing Order submitted for certification contained a provision relating to transfer of employees but it was deleted by the Appellate Authority on the ground that the Schedule of the Act does not include the matter of transfer. However the order of appointment agreed between the parties before the Standing Order came into force contained the condition of transfer. It was held that the certified Standing Order covering the terms and conditions applicable between the workman and the employer will prevail and the

1. A.I.R. 1974 S.C. 17.
2. (1983) 2 L.L.J. 410 (Karn.).
3. (1994) 1 Lab. L.J. 1004 (All.).
4. (1995) 1 Lab. L.J. 81 (All.).

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condition of transfer contained in the order of appointment cannot be applied. Hence employees cannot be transferred.

Sec. 4. Conditions for Certification of Standing Orders.—The Certifying Officer shall certify the Standing Orders under this Act if :—

(1) provision is made in the Standing Order for every matter set out in the Schedule, which is applicable to the industrial establishment ; and

(2) the Standing Orders are otherwise in conformity with the provisions of this Act.

The Certifying Officer or the appellate authority shall have the power to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders. While doing so the Certifying Officer is directed to consider and weigh the social interest in the claims of the employer and the demands of workmen.[1] Modification of Standing Orders is permissible under section 10 but that can be achieved only by adhering to the prescribed manner. Modification of Standing Order requiring giving of reasons in cases of discharge of workman was held to be fair and reasonable.[2] The question as to fairness and reasonableness of modification has been left by Legislature to the authorities empowered under the Act and the Supreme Court under Art. 136 of the Constitution would not be justified in interfering with conclusions of authorities unless an important principle of law requiring elucidation is involved.[3] The Parliament has by amending sections 4 and 10 of the Act given dual remedy to the workmen. One is to raise an industrial dispute under the Industrial Disputes Act and the other by conferring the right to individual workman to contest the Draft Standing Orders submitted by the employer for certification on the ground that they are either not fair or reasonable, and more important is the right to apply for their modification.[4]

Deviation from Model Standing Orders.—The appellate authority or the Certifying Officer shall see whether the Standing Orders satisfy the conditions necessary for certification. They can make necessary additions or modifications in Draft Standing Orders submitted to them for certification so as to make the draft certifiable under the Act.[5] When the Act provides that the Standing Orders drafted by the employers should, as far as practicable, be in conformity with the Model Standing Orders, it simply means that the model only presents a pattern and the drafts should try to resemble it. It does not mean that the Draft Standing Order should follow the model verbatim. The model does not have the force of a statutory rule which has to be obeyed without in any manner altering its content. The Model Standing Order is to be followed by the framers of the Draft Standing Order only in so far as it is practicable for them to follow. That shows that the framers, where they fail to follow, must satisfy the certifying officer as to the reasons for making any departure that has been made against the pattern set by the Model Standing Order. It is not sufficient to see that the Draft Standing Orders, are merely similar in form with the Model Standing Order.[6]

It is incumbent upon the Certifying Officer and the appellate authority to insist upon the Standing Orders conforming to the Model Standing Orders, unless the employer can satisfy them that it is not practicable for him to do so.[7] If no Model Standing Order has been set by the appropriate Government, the duty of the Certifying

1. *Western India Match Co.* v. *Workmen*, A.I.R. 1973 S.C. 2650.
2. *Shahadara Saharanpur Light Railway Co.* v. *S.S. Railway Workers Union*, A.I.R. 1969 S.C. 513.
3. *Ibid.*
4. *Ibid.*
5. *Mysore Kirloskar Employees' Association* v. *Industrial Tribunal, Bangalore*, A.I.R. 1959 Mys. 235.
6. *Jiwan Mal & Co.* v. *Secretary, Kanpur Lohe Mills Kamdar Sangh*, A.I.R. 1955 All. 581.
7. *Commissioner of Labour* v. *Associated Cement Companies*, A.I.R. 1955 Bom. 369.

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Officer is to see that the Draft Standing Order contains provisions for every matter set out in the Schedule applicable to the industrial establishment.

In case of any deviation made by the Draft Standing Order, in matters provided for in the Model Standing Order the Certifying Officer can judge the reasonableness of any such departures made from the model rules. But if provision has been made in the draft Standing Order in respect of any matter not contained in the Model Standing Order at all, it cannot be said that the draft is not in conformity with the provisions of the Model Standing Order.[1]

Reasonableness of Standing Order.—Section 3 of the Act empowers the Certifying Officer or the appellate authority to enquire into the impracticability to follow the Model Standing Order and section 4 of the Act authorises them to adjudicate upon the fairness or reasonableness of the Draft Standing Order. All these enquiries by authorities should be in an integrated manner and thus construed there will be no conflict between the two sections.[2] Where the Standing Order made no provision regarding age of retirement, an application by the employer for addition of a Standing Order providing age and ground of retirement could not be ordered as it could not be considered to be in conformity with the Model Standing Orders.[3]

With regard to the fixing of age of superannuation by Standing Orders the Supreme Court in *Jeewanlal Ltd.* v. *Workmen*,[4] observed that "the present day tendency was to fix the age of superannuation generally at 60 years unless the Tribunal feels that the work of the operatives is particularly arduous or hazardous where workmen may lose efficiency earlier.

In *Associated Cement Co. Ltd.* v. *P.D. Vyas*,[5] the Certifying Officer modified the Draft Standing Orders submitted by the management and in respect of the Standing Order relating to the notice period for discontinuance of a shift, he increased the notice period from 14 days to one month to bring it in conformity with the Model Standing Orders. On similar grounds the Standing Orders relating to what amounted to misconduct in relation to strikes and incitement to strikes was modified to include only illegal strikes. It was held that :

> "the cumulative effect of the provisions of the Act is that the Certifying Officer has to be satisfied that the Draft Standing Orders deal with every matter set out in the Schedule and are otherwise in conformity with the provisions of the Act."[6]

Matters not covered by the Schedule.—The question whether provision may be made in the Standing Orders in respect of any matter, which is neither covered by any item of the Schedule nor by the Model Standing Orders but which is fair and reasonable, the Supreme Court did not express any categorical opinion on this point in *U.P. Electricity Supply Co.* v. *T.N. Chatterjee*.[7] However, in the *Hindu* v. *Its Secretary*[8] the Madras High Court has held that there is no bar in making provision in the Standing Orders about any matter which is not covered by the Schedule, but it is obligatory to make provision with regard to matters covered by the Schedule.

In *Rohtak and Hissar District Supply Co. Ltd.* v. *State of U.P.*[9] the Supreme Court

1. *Akhil Ranjan* v. *Management, Assam Tribune*, A.I.R. 1965 Assam 40.
2. *Engineering Workers Union* v. *Appellate, Authority*, (1965) 1 L.L.J. 350.
3. *Jiwan Lal Ltd. Bombay* v. *Their Workmen*, (1956) 1 L.L.J. 116.
4. A.I.R. 1972 S.C. 1210.
5. A.I.R. 1960 S.C. 665.
6. *Ibid.*
7. A.I.R. 1972 S.C. 1201.
8. A.I.R. 1951 Mad. 107.
9. A.I.R. 1966 S.C. 1471.

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has held that the employer cannot insist upon adding a condition to the Standing Order which relates to the matter which is not included in the Schedule. It was further held that provision may be made in the Standing Order concerning the rights and liabilities of the employer and the employees and their enforcement by an internal arrangement between the employer and his employees.[1] It is not permissible under the Act to introduce appeals to outside authority and thereby extend the scope of the provisions which can legitimately be made by the Standing Orders.[2]

It was held in *S.K. Ghosh* v. *Chairman O.S.E. Board*,[3] that the certification by the Certifying Officer of a Standing Order containing a clause relating to the superannuation, neither covered by the Schedule to the Act nor by the Model Standing Order cannot be valid certification and the failure of employees to challenge such provision cannot add enforceability to it.

In *B.K. Chatterjee* v. *Jugantar Ltd.*,[4] the Supreme Court rejected the contention that because there was no sanction about the age of superannuation in the Schedule of the Act, therefore, the employee must be deemed to have continued in service even beyond the age of superannuation. It was held that the retirement at the age of 60 years as per the relevant Standing Orders is within the power of the employer and the subsequent service arose on a fresh contract and it cannot be regarded as a continuation of the original service.

Different Set of Standing Orders.—The Supreme Court in *U.P.E. Supply Co.* v. *T.N. Chatterjee*,[5] considered the question whether there can be different conditions of service for different employees in the same industrial establishment. It was held that "the scheme and object of the Act clearly shows that it was not intended by the legislature that different sets of conditions should apply to employees depending on whether a workman was employed before the Standing Orders were certified or after. If the intention was otherwise it would lead to industrial unrest and not industrial peace, the latter being the principal object of the legislation. After the amendment of the law in 1956 the Certifying Officer and the appellate authority are duty bound to examine the question of fairness of the Standing Orders and there can be no justification now not to give effect to the principle of uniformity of conditions of service which is clearly contemplated by the provisions of the Act.

Sec. 5. Certification of Standing Orders.—When the draft Standing Orders is submitted to the Certifying Officer, he shall forward a copy of it to Trade Union, if any, of the workmen or where there is no Trade Union to the workmen in such manner as may be prescribed together with the notice in the prescribed form requiring objections, if any, which the workmen may desire to make to the draft Standing Orders. The workmen or the Trade Union is required to submit the objections to the Certifying Officer within fifteen days from the receipt of the notice. The Certifying Officer shall give the employer, Trade Union or the representatives of the workmen opportunity of being heard. He shall, thereafter, decide whether any addition or modification in the draft Standing Orders is necessary or not to render it certifiable under the Act and shall make an order in writing. The Certifying Officer shall, after making modification, if any, certify the draft. He shall, within seven days from certification of the draft, send certified copies of it duly authenticated in the prescribed manner and of his order under section 5 (2) to the employer, Trade Union or other prescribed representative of the

1. *R. & H. Districts Electricity Supply Co.* v. *State of U.P.*, A.I.R. 1966 S.C. 1471.
2. *Ibid.*
3. A.I.R. 1970 Orissa 126.
4. (1983) II. L.L.J. 8 (S.C.).
5. A.I.R. 1972 S.C. 1201 ; *See* also *R.B. Diwan Badri Das* v. *Industrial Tribunal, Punjab*, (1962) 2 L.L.J. 366.

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workmen.

The purpose of framing the Standing Orders and getting them certified by the Certifyng Officer is that the conditions of service of that employment shall be regulated by it. The manner in which the Standing Orders are made and certified suggests that the Standing Orders, when certified, will be binding on the employees, who are at the time in service of the employer.[1] Certified Standing Orders are binding on all workmen whether originally employed before or after the Standing Orders were certified. The Standing Orders of an establishment when certified by the Certifying Officer, become the terms and conditions of service between the employer and his employees. The mere fact that the Certifying Officer has been authorised to amend or modify them does not render them non-statutory for the provision and procedure for their amendment is laid down in the Act itself.[2]

It was held in *Barauni Refineries P.S.P.* v. *Indian Oil Corporation Ltd. & Others*,[3] that no modification in Standing Orders is permissible when a settlement relating to that matter is in operation. Since in the course of settlement, the demand in respect of age of retirement was not acceded to, the modification of Standing Orders raising the age of superannuation from 58 years to 60 years would throw additional financial burden and as such will be in violation of settlement and, therefore, no such modification can be made.

In *Bharat Starch and Chemicals Ltd.* v. *Industrial Tribunal of Punjab*,[4] the question for consideration was whether the Standing Order was binding on workmen employed by the Company before the Standing Orders came into force. The Industrial Tribunal of Punjab has held to the contrary. The Punjab High Court quashed the order of the Tribunal and held that the decision of the Tribunal goes to the root of the validity of all authenticated Standing Orders so far as their applicability to workmen in employment before the date of authentication is concerned. It was further held that the matter affects the basic principles underlying the Act and it is an error apparent on the face of it ; therefore, the High Court will exercise its jurisdiction under Art. 226 of the Constitution in favour of the company and quash the order of the Tribunal.[5]

In *Hyderabad Allwyn Ltd.* v. *Addl. Ind. Tribunal, Labour Court, Hyderabad*,[6] discretion was given to employer under Certified Standing Order to retire a workman on completion of 35 years of full time service or on attaining the age of 58 years whichever is earlier. It was held that the above Certified Standing Orders would bind workmen who had entered service prior to coming into force of such standing orders. The company could retire a workman on the happening of any of the two alternative events and in that case it was under no obligation to give reasons in support of exercise of its discretionary power.

Where an application for certification of Standing Order was made to a Certifying Officer who did not have jurisdiction to deal with it at the time of the application, but acquired such jurisdiction later on, and had the jurisdiction when the order certifying the draft Standing Orders was made by him it was held that "the application for certification of the Standing Orders though invalid at the time it was made because the officer had no jurisdiction to deal with them, became a valid application when he did acquire jurisdiction ; to put the matter in another way, the application should be deemed to have been reviewed immediately after the officer acquired jurisdiction in the matter

1. *Sri Gopal Mills Ltd.* v. *State of Punjab*, (1959) 1 L.L.J. 639.
2. *C.E.S. Corpn.* v. *Ramratan Mahato*. A.I.R. 1973 Cal. 258.
3. (1991) 1 Lab. L.J. 46 (S.C.).
4. (1958) II. L.L.J. 243 (Pun).
5. *Ibid.*
6. (1990) 1 Lab. L.J. 454 (A.P.).

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and that jurisdiction having continued upto the date of certification, the certification also would be within his jurisdiction and binding."[1]

It is not the function of the Certifying Officer to suggest how the parties will govern their relationship outside the ambit of Standing Orders that he has certified.[2]

In *S. Ammelu* v. *The Superintending Engineer, S.A.E. System (S), Villupuram*,[3] the Tamil Nadu Electricity Board Employees Conduct Regulations prohibited an employee getting married to an already married person without prior permission of the Board. Such a conduct was not declared as a misconduct by the Certified Standing Orders. A lady employee married against the above Conduct Regulations and was, therefore, charged for misconduct. It was held that in view of the fact that certified Standing Orders do not declare such an act as misconduct the Regulation could not be invoked to take disciplinary action. The Regulation would not prevail over the Standing Order. Similar view has been expressed in the *Tamil Nadu Water Supply and Drainage Board* v. *M.D. Vijayakumar*.[4] It was held in this case that disciplinary action taken by the Board against its workmen based on the Regulations which were not in comformity with Standing Orders have to be struck down.

It was held in *Secretary, Bihar State Electrical Supply Workers' Union & others* v. *Presiding Officer, Industrial Tribunal & others*,[5] that topics neither included in Schedule to the Industrial Employment (Standing Orders) Act, 1946 nor in Model Standing Orders cannot be included in the Standing Orders. In this case, provision relating to 'promotion' was proposed in Standing Orders but the Certifying Officer refused to include the same and the refusal was held justified. It was also held that the provision in the Model Standing Orders for automatic cessation of employment is *ultra vires* the Constitution of India in as much as it offends Art. 14 of the constitution.

It was held in *Uptron India Ltd.* v. *Shammi Bhan*,[6] that any clause in the certified standing orders providing for automatic termination of service of a permanent employee, not directly related to "Production" in a factory or industrial establishment, would be bad if it does not prompt to provide an opportunity of hearing to the employee whose services are treated to have come to an end automatically.

Section 6. Appeals.—Any employer, workman, Trade Union or other prescribed representatives of the workmen aggrieved by the order of the Certifying Officer may, within 30 days from the date on which copies of the Draft Standing Orders are sent, appeal to the Appellate Authority whose decision thereon shall be final. The Appellate authority shall by order in writing confirm the Standing Orders either in the form certified by the Certifying Officer or after amending Standing Orders by making such modifications as it thinks necessary to render the Standing Orders certifiable under this Act.

The Appellate Authority shall within seven days of its order send copies of the Draft Standing Order to the Certifying Officer, employer, Trade Union or other prescribed representatives of the workmen. In cases the Appellate Authority makes any modification in the Draft Standing Order, it shall send a copy of the amended Standing Order along with his order. But no such copy needs to be sent by him if no modification has been made by him in the Draft Standing Order.

Abandonment or relinquishment of service is always a question of intention and normally, such an intention cannot be attributed to an employee without adequate evidence in that respect. But where the parties agree upon the terms and conditions of service and they are included in certified Standing Orders, the doctrine of Common law or considerations of equity would not be relevant. It would then be a matter of construing the relevant terms of the Standing Order.[7]

There is no specific provision in the Act empowering an Appellate Authority to

1. *General Manager, Bhilai Project* v. *Steel Workers' Union*, A.I.R. 1954 S.C. 1333.
2. *Shrikishan* v. *State of Rajasthan*, 1969 Lab. I.C. 513 (Raj).
3. (1990) 2 Lab. L.J. 96 (Madras).
4. (1991) 1 Lab. L.J. 260 (Madras).
5. (1995) 1 Lab. L.J. 633 (Patna).
6. AIR 1998 SC 1681.
7. *Buckingham and Carnatic Co. Ltd.* v. *Venkatiah*, (1953) 2 L.L.J. 638 (S.C.).

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correct the mistakes in the Standing Orders finally certified by it under section 6 (1) of the Act, before the expiry of six months from the date on which the Standing Order or the last modification thereof came into operation in the manner provided in section 10 of the Act, that is except on an agreement between the employer and the workmen.[1]

Where one of the issues referred to the tribunal was "whether the system of forced retirement of workmen at the age of 55 as introduced by the management by its Standing Orders was justified, in dealing with the issue the Tribunal had to consider not only the propriety, reasonableness and fairness of the rule, but it had also to deal with the question as to whether the said rule could and should be made applicable to employees who had already been employed by the appellant in service without any limitation as to the age of retirement. The Supreme Court observed that in fixing the age of superannuation, industrial tribunals have often enough considered this dual aspect of the question and it is the same dual aspect that was intended to be examined when the issue was framed.[2] When an appeal is preferred under section 6 of the Act the Standing Orders cannot be completely cancelled, they can either be confirmed or modified.[3]

In view of section 7 of the Act the Standing Orders came into operation on a particular date. In consequence of its operation certain rights and liabilities are created not only in the employees but also in the employers. It cannot be said that such Standing Orders would not bind the workmen as the employer failed to comply with the provisions regarding translation and publication of Standing Orders in question.[4] The case of the workmen need not necessarily be presented by the workmen themselves. It may be presented by their chosen representatives who need not be workmen.[5] Sections 5 and 6 of the Act clearly contemplate filing of objection, hearing and decision, and then making it open to the aggrieved party to file an appeal before the prescribed authority.[6]

In *B.H.E.L. Employees' Association* v. *Chief Labour Commissioner*,[7] the copy of certified Standing Orders dated 31st December, 1984 was sent by registered post on 5th January 1985 and the same was received on 7th January 1985. The Union sent the memorandum of appeal by registered post on 4th February 1985 which reached the appellate authority on 8th February 1985. The appeal was rejected as barred by limitation. It was held that the appeal was not time barred because the appeal papers sent on 4th February, 1985, in the ordinary course of post should have reached on or before 7th February 1985. Petitioner can not be held responsible for any delay caused in transit when it had used sufficient care to see that the papers were mailed in time so that they could reach appellate authority in ordinary course of post. Consequently the appellate authority was directed to dispose of the appeal on merits.

In *Badrapur Power Enginers Association* v. *Deputy Chief Labour Commissioner and others*,[8] the certified standing orders were despatched on 7 January 1991 and the appeal was filed on 6 February 1991. The question was whether the appeal was filed within the prescribed limitation period of 30 days. It was held that in view of provisions of Section 6 an appeal could be filed within 30 days from the date on which copies of certified standing orders are sent. In this case the appeal was held to be filed within 30

1. *Patna Electricity Supply Workers Union* v. *A. Hussain*, A.I.R. 1968 Pat. 427.
2. *Guest Keen Williams (Private) Ltd., Calcutta* v. *P.E. Sterling*, A.I.R. 1959 S.C. 1279.
3. *Bijli Mazdoor Sangh* v. *Resident Engineer Allahabad*, A.I.R. 1970 All. 589.
4. *Ismail Papamia* v. *Labour Appellate Tribunal of India*, A.I.R. 1956 Bom. 584.
5. *Mysore Iron & Steel Works Bhadravathi* v. *Appellate Authority*, A.I.R. 1963 Mys. 290.
6. *The Coimbatore Pioneer Mills Ltd.* v. *The Presiding Officer, Labour Court*, (1963) 1 M.L.J. 52 (H.C.).
7. (1986) 2 Lab. L.J. 260 (Karn.).
8. (1993) 1 Lab. L.J. 99 (Delhi).

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days because January 7 was to be excluded in view of Section 9(1) of the General Clauses Act.

Any person whose right has been affected by any order of the authorities under this Act can go to the High Court under Art. 226 of the Constitution for the enforcement of his right by means of any directions or writ in the nature of *certiorari* or *mandamus*.[1]

In *Kerala Agro Machinery Corpn. Ltd.* v. *Industrial Tribunal and others*,[2] the Appellate Authority set aside certified standing orders and directed the Certifying Officer to consider the matter afresh. This order was challenged in a writ and the Kerala High Court held that the power of the Appellate Authority under section 6 is to confirm the standing orders either in the form certified by the Certifying Officer or by amending the same or by making such modifications or additions as it thinks necessary to render the standing orders certifiable under the Act. The Appellate Authority has no power to set aside the orders of the Certifying Officer and remand the matter for fresh disposal.

With regard to the applicability of the principle of *res judicata* to the proceedings for modification of Standing Orders the Supreme Court held that it is doubtful whether principles analogous to *res judicata* can be applied.[3]

Sec. 7. Date of operation of Standing Orders.—The Standing Orders certified by the Certifying Officer shall, unless an appeal is preferred, come into operation on the expiry of 30 days from the date on which authenticated copies are sent. If an appeal is preferred, it shall come into operation on the expiry of seven days from the date on which copies of the orders of the Appellate Authority are sent. After a Standing Order comes into operation, it is binding upon the employer, all his employees presently employed and also those employed thereafter in the establishment.[4] The right of the employees to challenge the validity or propriety of such an order to claim modification in it by raising an Industrial Dispute cannot be disputed.[5] Further it is not open to the employer and the workmen to contract themselves out of the right and obligations created by the Standing Order.[6] Section 7 of the Act is subject to no limitations. Therefore, the Standing Order after being certified must come into operation in accordance with the provisions of section 7 of the Act. Non-compliance with the provisions of section 9 of the Act was held not to affect the operation of the Standing Orders which were duly certified.[7]

Sec. 8. Register of Standing Orders.—A copy of all Standing Orders as finally certified under this Act shall be filed by the Certifying Officer in a register in the prescribed form maintained for the purpose. A copy of the Certified Standing Orders shall be furnished to any person applying for it on payment of the prescribed fee.

Sec. 9. Posting of Standing Order.—The text of Standing Orders as finally certified under this Act shall be prominently posted by the employer in English and in the language understood by the majority of the workmen, on special board to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment. A copy of such Standing Order shall also be posted in all departments where the workmen are employed. Non-compliance with these provisions by the employer may prejudicially affect the workmen. But at the same time non-compliance by the employer should not be wilful or negligent. The Tribunal has to keep in view all these factors in coming to a decision. It cannot be held that mere

1. *A.R. Das Gupta* v. *Assam Tribunal, Gauhati*, A.I.R. 1965 Assam 40.
2. (1988) 2 Lab. L.J. 18 (Kerala).
3. *S.S. Rly. Co.* v. *Workers Union*, A.I.R. 1969 S.C. 513.
4. *Agra Electricity Supply Co. Ltd.* v. *Alladin*, A.I.R. 1970 S.C. 512.
5. *Guest Keen, Williams (Private) Ltd.* v. *Sterling*, A.I.R. 1959 S.C. 1279.
6. *Tata Chemicals Ltd.* v. *Kailash*, A.I.R. 1964 Guj. 265.
7. *Colin (India) Ltd. Bombay* v. *Damodar Rajan Ram Bhosale*, (1955) 2 L.L.J. 139, (L.A.T.).

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failure to comply with section 9 of the Act will deprive the Standing Orders of their binding character.

Sec. 10. Duration and modification of Standing Orders.—The Standing Orders finally certified under the Act shall not, except on agreement between the employer and the workmen or a trade union or other representative body of the workmen, be liable to modification until the expiry of six months from the date on which the Standing Orders or the last modifications thereof came into operation. Under section 10 of the Act the Standing Orders are immutable for the first six months from the date on which these came into operation.[1] But there is no bar in the way of employer or workmen in applying to the Certifying Officer to have standing orders modified after the said period. Subject to the above provisions an employer or workmen or a trade union or other representative body of the workmen may apply to the Certifying Officer to have the Standing Orders modified. Any such application must be accompanied with five copies of the modifications proposed to be made. If the employer and the workmen have agreed to the proposed modifications, a copy of such agreement shall be filed along with the application for modification. The provisions regarding modifications do not bar the reference of dispute as to revision or modification of the Standing Order for adjudication.[2] Any modifications in the Standing Order shall be certified in the same manner as the first Standing Orders. The above procedure for modification of Standing Orders shall not apply to an industrial establishment in respect of which the appropriate Government is the Government of the State of Gujarat or Maharashtra.

It is one of the settled principles of construction that when a statute confers power to perform an act in a particular manner, it shall be performed in the manner provided for in the statute. In view of this rule section 10 (2) does not authorise the representative of an employer or a workman to make an application for modification of the certified Standing Orders because the right to apply for modification is given personally to an employer or workman.[3]

In *Shahadra Saharanpur Light Railway Co.* v. *S.S. Railway Workers Union*,[4] the Standing Order relating to the termination of service of a permanent workman was modified requiring the employer to give reasons and communicating the same to the workmen in addition to giving one month's notice or one month's pay in lieu of notice. The modification was held to be fair and reasonable. But the modification of the Standing Orders requiring the giving of second show cause notice at the stage of imposing punishment of removal cannot be considered as fair and reasonable.[5]

Where an Electricity undertaking was taken over by the State and neither the Industrial Employment (Standing Orders) Act nor the Electricity Act provided for automatic continuance of the Standing Orders of the previous undertaking after its purchase, the purchaser must comply with section 3 and without it there can be no certification under section 5 which is a condition precedent to an application under section 10.[6]

Andhra Scientific Company sought permission to amend the Standing Orders by reducing festival holidays from 17 to 10. It was held that entry 5 of Schedule to the Act does not empower prescription of number of holidays but only prescribes procedure for notifying holidays, etc. Therefore, the modification purporting to prescribe the number

1. *Associated Industries* v. *B.B. Singh*, A.I.R. 1979 A. & N. 31.
2. *Guest Keen Williams (Private) Ltd.* v. *Sterling*, A.I.R. 1959 S.C. 1279.
3. *Sundaram Industries Ltd.* v. *Secretary, M.M. Labour Union*, (1980) 2 L.L.J. 313 (Mad.).
4. A.I.R. 1969 S.C. 513.
5. *Ibid.*
6. *Bijli Mazdoor Sangh* v. *Resident Engineer Allahabad*, A.I.R. 1970 All. 589.

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of holidays would not be in conformity with the Act.[1]

The conditions when modification of the Standing Orders can be made were elaborately discussed by the Supreme Court in *Shahadara Saharanpur Light Railway Co. Ltd.* v. *S.S. Railway Workers Union*.[2] It was held that section 10 does not state that once a Standing Order is modified and the modification is certified, no further modification is permissible except upon proof that new circumstances have arisen since the last modification. An application for modification would ordinarily be made where (1) a change of circumstances has occurred, or (2) where experience of the working of the Standing Orders last certified results in inconvenience, hardship, anomaly etc., or (3) where some fact was lost sight of at the time of certification, or (4) where the applicant feels that a modification will be more beneficial. It is clear that in categories other than the first one, there will be no change of circumstances. But that does not mean that no modification can be asked although the Standing Order has resulted in hardship, inconvenience or anomaly, etc. but because there is no change of circumstances. Section 10 does not lay down any restriction on the right to apply for modification except those that are provided in that section itself. It was further observed by the Supreme Court that "the Act is a beneficient piece of legislation, and, therefore, unless compelled by any words in it the Court would not be justified in importing in section 10 through inference only a restriction to the right conferred by it on account of supposed danger of multiplicity of applications.[3] The object of providing a time of 6 months for modification from the date the Standing Orders or the modification came into operation was to allow the Standing Orders to work for a sufficiently long time to see whether they work properly or not. Even that time limit is not rigid because a modification even before six months is permissible by an agreement with the parties.

In *The Hindu* v. *Its Secretary*,[4] the Standing Orders provided that every employee shall retire on completing the age of 58 years or 30 years of unbroken service, whichever is earlier. After enactment and application of this Act the Union of the employees applied for modification of this Standing Order so as to provide that 'every employee shall retire on attaining the age of 58 which shall be fixed as the age of superannuation. It was observed that 'termination of employment' in item 8 of the Schedule is wide enough to include retirement of employees at the age of superannuation. In considering whether the age of retirement or superannuation should be raised, the ability of the employer to meet the additional commitments that would be involved is a relevant factor and the Appellate Authority was certainly entitled to take it into account.

In *Indian Oil Corporation Ltd.* v. *Joint Chief Labour Commissioner & Appellate Authority & others*,[5] the Model Standing Orders provided for the age of retirement at 58 years. The workmen demanded modification of certified standing order and fix the age of superannuation at 60 years. It was held that the Authority has jurisdiction to modify standing order even in conflict with model Standing Order provided such modification is fair and reasonable. Therefore, the age of superannuation, can be raised to 60 years.

Where a modification in the existing Standing Orders has been agreed upon between the employer and the workman the certifying officer is not bound to accept the changes if they are not in conformity with the prescribed model Standing Orders.[6] Under

1. *Andhra Scientific Co. Employees' Union* v. *Manager*, (1970) 1 L.L.J. 555 (A.P.).
2. A.I.R. 1969 S.C. 513.
3. *Ibid.*
4. A.I.R. 1951 Mad. 107.
5. (1990) 1 Lab. L.J. 408 (Delhi).
6. *United Glass Work Ltd. Society* v. *Their Workmen*, (1955) 2 L.L.J. 327.

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the present Act, if the workmen are dissatisfied with the operation of the existing Standing Orders they can apply to the Certifying Officer for modification. Before the amendment of section 10 giving right to the workmen to apply for any modification in the Standing Orders, the only course open to the workmen to adopt for securing any modification in the existing Standing Orders was to raise an industrial dispute and move the appropriate Government to refer the said dispute to the adjudication of the appropriate Industrial Tribunal.[1]

In *S.W. Union* v. *Chief Labour Commissioner*,[2] the Standing Orders in Bhilai Steel Plant applied two different sets of leave rules to the employees depending upon the fact whether they were appointed prior to or after April, 1960. An application under section 10 (2) for modification of Standing Orders so as to make them uniform in application was made. The application for such modification was held to be maintainable because uniformity of Standing Orders in application to all workmen was the essential attribute of Standing Orders.

In *Ghaziabad Engg. Co.* v. *Certifying Officer*,[3] the workers of the appellant Company demanded 2 days casual leave and requested modification of the Standing Orders accordingly. The Certifying Officer, Kanpur granted modification of the Standing Orders providing for six days casual leave on a paid basis. The Certifying Officer considered the grant of leave as fair and reasonable having regard to the prevalent practice in the neighbouring industries and also paying attention to the financial position of the appellant's undertaking. The Appellate Authority, namely, the Industrial Tribunal also concurred in the same conclusion. Appeal by special leave was made to the Supreme Court against this decision of the Appellate Authority. It was held that these are pure questions of fact and Supreme Court's jurisdiction under Article 136 cannot be exploited for canvassing points such as these. The modification was, therefore, within the jurisdiction of the Certifying Officer and he has not contravened any provision of the Act, or any statute. It was further observed that there was nothing illegal in the order impugned nor there is anything shockingly violative of fairness or justice. It is a notorious fact that casual leave is not an automatic advantage to the total number of days' leave that a worker is entitled. It is only in the event of sudden emergencies that casual leave is allowed and so the grievance of the appellant that the total may exceed to overall minimum of thirty days' leave is exaggerated, if not imaginary. Further it cannot be said that the current trend in a particular area or industry has the force of law. It may have persuasive value but not more.

In *Chemplast Employees' Union, Ram Nagar Metter Dam* v. *The Appellate Authority Etc.*,[4] the management applied for amendment of Standing Orders. Notice was issued to Unions and the Certifying Officer allowed the amendment after rejecting the objections raised by the Unions. Appeal filed by one of the Unions was dismissed by the Labour Court on the ground that the Union has no right of appeal. It was held by the Madras High Court that the Union has such a right. It was further held that apart from the statutory source of section 10 (2) read with section 5 (2) of the Act, Union having right to be heard when an amendment is sought for, even on the general principle has right to move appeal.

In *M.C. Raju* v. *Executive Director*,[5] a peculiar situation arose regarding the applicability of the amended standing orders. The concerned establishment was

1. *Salem Erode Electricity Distribution Company (P.) Ltd.* v. *Their Employee's Union*, A.I.R. 1966 S.C. 808.
2. A.I.R. 1971 M.P. 93.
3. A.I.R. 1978 S.C. 769.
4. (1984) 1 L.L.J. 209 (Mad.).
5. (1985) 1 L.L.J. 240 (Ker.).

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governed before its first standing orders came into operation by the model standing orders. The model standing order was amended subsequent to the coming into operation of the first standing orders, but before it has completed the requisite period of six months. The question that arose for determination was whether the amended model standing orders came into effect automatically? It was held that it did not come into operation automatically. Steps have to be taken to amend the existing standing orders in accordance with section 10 of the Act. Unless the steps are taken to bring the existing standing orders in conformity with the amended model standing orders, the amended model standing orders will not be applicable to the establishment. This view also derives support from a bar as contemplated in sub-section (1) of section 10.

Sec. 10-A. Payment of subsistence allowance.—(1) Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance—

(a) at the rate of fifty per cent of the wages which the workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension ; and

(b) at the rate of seventy-five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

(2) If any dispute arises regarding the subsistence allowance payable to a workman under sub-section (1), the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), within the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situate and the Labour Court to which the dispute is so referred shall, after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

(3) Notwithstanding anything contained in the foregoing provisions of this section, where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than the provisions of this section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that State.

In *Kalyanpur Keshav Venkatrai Pai* v. *Corporation Bank*,[1] the petitioner was Manager of Corporation Bank, Kalbadevi Branch, Bombay. The petitioner claimed subsistence allowance based on Bombay Shops and Establishments Act, 1948 and the Standing Orders Act, 1946. The Standing Orders Act and rules were *mutatis mutandis* made applicable for the purpose of subsistence allowance to the employees of the establishments governed by the Shops Act. It was held that the Standing Orders Act and rules will apply to only such of the employees of the Shops Act who would be "workman" within the meaning of the Standing Orders Act and rules framed thereunder. Employees who are not workman as above will not be covered by section 38-B of Bombay Shops and Establishment Act. By applying the rule of harmonious construction, it is clear that Legislature could not have intended to confer on managerial employees the benefits if benevolent provisions meant primarily to protect 'workman'. Since manager of a Bank is not a workman he cannot claim subsistence allowance.

In *R. Govendaraj and others* v. *Govt. Tool Room and Training Centre*,[2] the petitioners who were employees of the respondent were suspended for certain charges

1. (1988) I Lab. L.J. 244 (Bombay).
2. (1990) I Lab. L.J. 110 (Madras).

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pending domestic inquiry. In the inquiry the petitioners were found guilty of the charges for which punishment by way of reduction was imposed and they were reinstated in service. The employer ordered for recovery of subsistence allowance paid to them. This order was challenged in this petition. The Standing Order of the concerned establishment provides that the employees found guilty shall be deemed to be absent from duty for the suspension period and shall not be entitled to any remuneration. The Karnataka High Court held that the rule meant that where an employee is exonerated he will be entitled for full salary and allowances which he would have drawn had he not been placed under suspension. The rule does not say that subsistence allowance paid can be recovered. Any such provision would be arbitrary and violative of Article 14 of the Constitution. The Standing Order cannot be interpreted in such a manner as to come in conflict with the provisions of the Constitution. Further such construction would be violative of section 10-A of the Act.

Sec. 11. Powers of Certifying Officer.—Every Certifying Officer and appellate authority shall have all the powers of Civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the discovery and production of documents. Every such authority is also deemed to be a Civil Court within the meaning of sections 345 and 346 of the Criminal Procedure Code, 1973.

Clerical or arithmetical mistakes in any order passed by a Certifying Officer or appellate authority, or errors arising therein from any accidental slip or omission may, at any time, be corrected by that officer or authority or the successor-in-office of such officer or authority, as the case may be.

In *Associated Industries* v. *B.B. Singh*,[1] Supreme Court observed that the fact that under section 11 of the Act, the Certifying Officer and the Appellate Authority have all powers of a Civil Court for certain specified purpose will not convert them to a 'Court', nor the fact that the matter was agitated in a writ petition before the High Court will make the proceeding before Labour Court "a civil proceeding in a Court".

In *N.G.E.F. Ltd. Byappanapalli* v. *Industrial Tribunal*,[2] the Appellate Authority while certifying the modified Standing Order, certified the very version which it had rejected. Further while fixing various categories of leave facilities, it failed to prescribe the procedure for applying for leave and the authority who should grant it. The employer applied under section 11 (2) for rectification of these accidental slips or omissions. But the application was dismissed by the Authority because the modification could be done after the expiry of six months from the date of certification. It was held that : "the authority had wrongly overlooked the scope of the application and that he erred in considering application for modification of Standing Orders. The Appellate Authority had the obligation to draw up the Standing Orders in conformity with the orders passed in appeal placed before it. Therefore, in view of the court the order suffered from material omissions in the matters certified and the application made by the employer under section 11 (2) of the Act, was wholly competent."

Sec. 12. Oral evidence in Contradiction of Standing Orders not admissible.—No oral evidence having the effect of adding to or otherwise varying or contradicting Standing Orders as finally certified under this Act shall be admitted in any court. Although oral evidence in contradiction of the Standing Orders is barred but there is no prohibition against a written agreement between the employer and the employee.

Sec. 12-A. Temporary Application of Model Standing Orders.—Notwithstanding anything contained in sections 3 to 12 for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending

1. A.I.R. 1972 A. & N. 31.
2. A.I.R. 1970 Mys. 149.

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with the date on which the Standing Orders as finally certified under this Act come into operation under section 7 in that establishment ; the prescribed Model Standing Orders shall be deemed to be adoptd in an establishment and the provisions of sections 9, 13 (3), 13-A shall apply to such Model Standing Orders as they apply to the Standing Orders so certified.

These provisions shall not apply to an industrial establishment in respect of which the appropriate Government is the Government of Gujarat or Maharashtra.

The Standing Orders represent a contract between the employer and the employee and whether the employer or the employees have voluntarily agreed to certain conditions or not, the provisions of the Standing Orders would supplement the original contract and would take its place where the original contract is contrary to these Standing Orders.[1] However, they essentially represent a contract of employment and where a contract exists that the employee is free to come and go at any time, no provision in these orders may be read which compels the employee to attend to his work at a particular time and to remain at his work for the entire period of the day which is notified as the working hours of the industrial premises.[2]

In *Voltas Limited* v. *K.D. Kochargaonkar & Another*,[3] the Model Standing orders were notified under the Act and the petitioner had its own certified standing orders. Subsequently the model standing order was modified and standing order 4-C was added. It was held that every amendment to the Model Standing orders does not *per se* become applicable to an industrial establishment which has its own certified standing order. The only way in which the workmen could get the benefit of the modified model standing order wo ld be to get their own standing order amended and certified in accordance with the provisions of the Act. Until such modification and certification is made they would continue to be governed by their certified standing orders.

Sec. 13. Penalties and Procedure.—Non-submission of draft Standing Orders by the Employer within the time limit specified in the Act is made penal under section 13 of the Act. Similarly modification of the Standing Orders otherwise than in accordance with the provision laid down in section 10 of the Act shall also be punishable. For these failures a fine extending to rupees five thousand may be imposed upon the employer. In case of continuing offence a further fine extending to rupees two hundred per day after the first day during which the offence continues may be imposed upon the employer.

An employer who does any act in contravention of the Standing Orders finally certified under this Act for his industrial establishment shall be punishable with fine which may extend to one hundred rupees and in the case of continuing offence with a further fine which may extend to twenty-five rupees for every day after the first during which the offence continues. No prosecution for an offence punishable under section 13 of this Act shall be instituted except with the previous sanction of the appropriate Government. No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the second class shall try an offence under section 13 of the Act.

Sec. 13-A. Interpretation of Standing Orders.—If any question arises as to the application or interpretation of Standing Orders certified under this Act, any employer or workman or a Trade Union or other representative body of the workmen, may refer the question to any one of the Labour Courts constituted under the Industrial Disputes Act, 1947, and specified for the disposal of such proceeding by the appropriate Government by notification in the Official Gazette. The Labour Court to which the question is referred as stated above for disposal, shall give the parties an opportunity of

1. *C.M. Patel* v. *State*, A.I.R. 1971 Bom. 244.
2. *Ibid.*
3. (1996) 1 LLJ 1173 (Bom).

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being heard and then decide the question accordingly. Hearing the parties would not include leading evidence before the court for determination of disputed question of fact.[1] The decision so arrived at by the Labour Court shall be final and binding on the parties. The function of the Labour Court under section 13-A of the Act is limited only to the decision of the question as to the application or interpretation of the Standing Orders which is referred to it. The Labour Court is not empowered to grant redress for violation of the rights and obligations created under the Standing Orders. It was held by the Gujarat High Court that the Labour Court under section 13-A cannot declare that the dismissal of the workman is null and void and that the workman continues in the employment of the employer, nor can it give any direction to the employer to pay to the workman his emolument from the date of dismissal upto the date of reinstatement.[2] Under section 13-A the right to move Labour Courts as to the application or interpretation of the Standing Orders is granted to the workman and not to the Trade Unions. Therefore any application filed by a Union under section 13-A will have to be rejected by the Labour Court.[3] A dismissed or discharged workman is not covered by the definition of "workman" in section 2 (i) of the Act. Hence a dismissed or discharged workman cannot apply under section 13-A of the Act to the Labour Court as to the application and interpretation of a Standing Order.[4]

In *M.E. & R. Industries* v. *Workmen*,[5] the question related to the interpretation of Standing Order which provided that 'commission of any act subversive of discipline or good behaviour within the premises or precincts of the establishment' by a workman shall amount to misconduct. It was held that the words "within the premises or precincts of the establishment" refer not to the place where the act which is subversive of discipline or good behaviour is committed but where the consequence of such an act manifests itself. In other words, an act, wherever committed, if it has the effect of subverting discipline or good behaviour within the premises or precincts of the establishment, it will amount to misconduct under the Standing Order.

In *Ram Asrey & others* v. *Labour Court II Kanpur & another*,[6] the petitioners had assaulted one Junior Officer in front of the factory gate when he came out of the factory after finishing his day's work. It was held that the assault amounted to misconduct being connected with the performance of the Junior Officer's duty and it is subversive of discipline and efficiency within the mill premises.

It was held in *The Rajasthan State Road Transport Corporation and Another* v. *Krishna Kant etc.*,[7] that the certified Standing Orders are not in the nature of delegated/subordinate legislation under the Industrial Employment (Standing Orders) Act, 1946. After certification standing orders do not become part of the Act. They constitute the conditions of service of the employees which are binding upon both the employer and the employees.

In *Sabhapati Singh* v. *U.P. State Road Transport Corpn. & Another*,[8] certain Government employees whose age of retirement was 58 years were working on deputation in U.P. State Road Transport Corporation, where the age of retirement of the Corporation employees was 60 years. It was held that the retirement of employees

1. *Chipping and Painting Employers Association (Pvt.) Ltd. Bombay* v. *A.T. Zambre*, A.I.R. 1969 Bom. 274.
2. *Tata Chemicals Ltd.* v. *K.C. Acharya*, A.I.R. 1964 Guj. 265.
3. *General Secretary Indo-Ashahi Glass Co. Ltd. Mazdoor Sangh* v. *Indo-Ashahi Glass Co. Ltd.*, 1964 (8) F.L.R. 390 (L.C.).
4. *S.K. Mukherjee* v. *Calcutta Electric Supply Co. Ltd.*, (1963) 1 L.L.J. 603.
5. A.I.R. 1975 S.C. 2125.
6. (1991) 2 Lab. L.J. 427 (All.).
7. (1995) 2 Lab. L.J. 728 (S.C.).
8. (1994) 1 Lab. L.J. 211 (All.).

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working on deputation who were originally Government servant at the age of 58 years is legal.

It was held in *V.K. Verma* v. *Hindustan Machine Tools Ltd. & Another*,[1] that where provision is made in the Standing Orders for deduction of wages for absence from duty, it cannot be said to be by way of penalty. It was further held that habitual late attendance is a misconduct under Standing Orders and action of management in taking disciplinary action besides deducting wages is legal and proper.

Sec. 14-A. Delegation of Powers.—The appropriate Government may by a notification in the Official Gazette, delegate the exercise of any power exercisable by such Government under the Act. The matters in relation to which the powers are delegated and the conditions under which delegation is made must be specified in the direction. Where the appropriate Government is the Central Government it can delegate its authority as aforesaid to any officer or authority subordinate to it or to the State Government, or to any officer or authority subordinate to the State Government. Where the appropriate Government is the State Government, it can delegate its power to any officer or authority subordinate to it.

Section 15. Power to make rules.—(1) The appropriate Government may, after previous publication, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe additional matters to be included in the Schedule, and the procedure to be followed in modifying standing orders certified under this Act in accordance with any such addition ;

(b) set out model standing orders for the purposes of this Act ;

(c) prescribe the procedure of Certifying Officers and Appellate Authorities ;

(d) prescribe the fee which may be charged for copies of standing orders entered in the register of standing orders ;

(e) provide for any other matter which is to be or may be prescribed :

Provided that before any rules are made under clause (a) representatives of both employers and workmen shall be consulted by the appropriate Government.

(3) Every rule made by the Central Government under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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1. (1994) 1 Lab. LJ. 62 (Pat. H.C.).

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THE TRADE UNIONS ACT, 1926

CHAPTER I
PRELIMINARY

History of Trade Unionism in India.—The germs of trade unionism in India can be traced back to the year 1890, when for the first time an association of mill workers was formed in the name and style of 'Bombay Millhands Association'. This association was formed for the redressal of grievances of the Bombay mill workers. It is difficult to treat this association as Trade Union in the strict sense in which this expression is used now-a-days. Very little account is available about its mode of working. After the first world war was over the cost of living considerably increased. The political agitation against foreign rule was also gaining momentum throughout the country. The increase in cost of living and country-wide political upsurge found its way in economic discontent amongst masses, particularly in industries. The industrial unrest and economic discontent led to a number of strikes by workers, guided and controlled by their Action Committees consisting of representatives of workers themselves. On many occasions these strikes were successful in getting the demands of the workers fulfilled. The Trade Union movement in India got impetus by the success of strikes in India and the world-wide uprising of labour consciousness. The establishment of International Labour Organisation has also influenced the growth to the trade union movement in our country.

The progress of the trade union movement in India in pre-independence days has not been very satisfactory, but the post-independence has been a tremendous Trade Union activity in every sphere of industry. Now there is hardly any category of workers which has no Union of its own. The Royal Commission on Labour in India has observed :

> "Trade Unionism to be fully effective, demands two things : a democratic spirit and education. The democratic ideal has still to be developed in the Indian workers and the lack of education is the most serious obstacle of all. The latter difficulty does not arise merely or even mainly from illiteracy. Few Trade Unions can afford to conduct benevolent work, and the majority find it hard to convince the worker that a subscription is worthwhile except when a dispute is imminent or in progress."[1]

Development of Trade Union Law in India.—After independence democratic spirit is gradually developing among the Indian citizens and the workmen in industry are not an exception to it. It was in the year 1920 that the High Court of Madras in a suit filed against the officials of the Madras Textile Labour Union by Binny & Co. granted an injunction restraining the Union Officials to induce certain workers to break their contracts of employment by refusing to return to work. Obviously the leaders of the Trade Union found themselves liable to prosecution and imprisonment even for *bona fide*, trade union activities. It was then that they felt that some legislative protection of Trade Union was necessary. Mr. N.M. Joshi, the then General Secretary of All India Trade Union Congress, successfully moved a resolution in the Central Legislative Assembly seeking introduction of some measure by the Government for protection of

1. Report of Royal Commission on Labour in India, p. 321.

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Trade Unions. The employers were so much opposed to any such legislative measure being adopted that the passing of the Indian Trade Union Act could only be possible in 1926. But this Act was enforced only from 1st June, 1927.

The contribution of the capital and labour in any industry is equally important. Therefore, the prosperity of an industry depends upon the co-operation of its two components—the capital and the labour. As disputes between the capital and the labour are inevitable so the object of any industrial legislation is to ensure smooth relationship between the two and to strive for settlement of any dispute by resorting to negotiation and conciliation. The importance of the Trade Unions lies in the fact that they encourage such collective bargaining as ensures better terms and conditions of employment to the labour, and at the same time endeavours for maintenance of good relations between employer and employees. In their endeavour to secure better working conditions, privileges and amenities to the labour, the Trade Unions adopt certain methods, namely, legislation, collective bargaining, mutual insurance, and strike. The method of mutual insurance is almost unknown to Trade Unions in India.

The original Act of 1926 was amended in 1929 so as to provide for the procedure of appeal against the decisions of the Registrar. When the Registrar refused to register a Trade Union or when the registration was withdrawn, an appeal could be preferred against any such decision of the Registrar. The Royal Commission on Labour, after examining the working of the Act made the following recommendations :—

(1) The Act was to be re-examined within 3 years. The limitations imposed upon the activities of the Trade Unions and their office-bearers were to be reconsidered. It should be ensured that a *bona fide* Trade Union is not deprived of applying for registration.

(2) The accounts of the Trade Union should be audited free of charge by Government officers.

(3) At least two-third members of the executive of a Trade Union should be persons actually engaged or employed in industry to which the union relates.

(4) Trade Unions should not be deprived of carrying on co-operative societies.

The original Trade Unions Act of 1926 made provisions in respect of—

(i) Conditions governing the registered Trade Unions.

(ii) Obligations imposed upon a registered Trade Union.

(iii) Rights and privileges of a registered Trade Union.

Under the original Trade Unions Act of 1926, where the object of a Trade Union was not confined to one State the appropriate Government was the Central Government and the powers of the provincial Governments in respect of such Unions were by the Government of India (Adaptation of Indian Laws) Order, 1937 vested in the Central Government. But after the first Labour Ministers' Conference held in January 1940, the powers in respect of a Union whose object was not confined to one State, were to be exercised by the Government of that province where the registered office of the Union was situated.

Indian Trade Union (Amendment) Act, 1947.—The Indian Trade Unions Act, 1926 made provision for registration of a Trade Union after fulfilling the requisite conditions but the employer was under no obligation either to recognise or to deal with a Trade Union even if it was a registered one. The Royal Commission on Labour pleaded for recognition of representative Trade Unions in spirit as well as in the letter. The matter was repeatedly discussed in various Labour Minister's Conferences and Standing Committees. Consequently, the Act was amended in the year 1947 providing for compulsory recognition by employers of representative Trade Unions. The following provisions were made in the Amending Act,—

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(1) Recognition of Trade Unions by employers. Any dispute regarding recognition was to be decided by the Labour Court set up under the Act.

(2) Recognition was to be granted if the Union applying for such recognition was representative of all workers in the concerned establishment or industry.

(3) If a registered Trade Union has applied for recognition to the employer, but failed to get recognition within three months, it could apply to the Labour Court set up for the formal recognition by the employer. The required particulars were to be furnished along with any such application. If the Labour Court, after necessary investigation is satisfied that the Union fulfils all the conditions necessary for recognition by the employer, it shall pass an order directing such recognition.

(4) The executive of a recognised Trade Union has the right of negotiation with the employer in respect of any matter connected with the employment, non-employment, terms of employment, conditions of work of all or any of its members.

(5) Certain acts amounting to unfair labour practices on the part of the Trade Unions and certain others on the part of the employers were declared in the Act. The Act further refrains both the Trade Union and the employer to desist from unfair practices. The recognition of any Trade Union found guilty of unfair practice can be withdrawn on an application by the employer to the Registrar. In case of an employer found guilty of unfair practice a fine upto Rs. 1000/- may be imposed by the Registrar on an application by the Trade Union.

(6) Some of the acts which were declared to be unfair practices are as follows :—

(i) participation, support or instigation of an irregular strike ;

(ii) submission of returns containing false statement ;

(iii) discharge or discrimination against any officer of a recognised Trade Union ;

(iv) interference with the formation or administration of a Trade Union.

Trade Union Bill 1950.—The Amending Act of 1947 did not provide for inspection of books of Trade Unions by the Registrar of Trade Unions. The Chief Labour Commissioner (Central) in his report on the representative character of the All-India Trade Union Congress suggested that the periodical inspection of registers, records and account books of the Trade Unions by the Registrar or some other person deputed by him was necessary for the development of Trade Unions on healthy lines. The matter was also discussed at the eleventh session of the Standing Labour Committee in January 1949. On the basis of the discussions held in the Standing Labour Committee a Trade Union Bill, seeking to make some new provisions was introduced in Parliament in February 1950. This Bill lapsed with the dissolution of Parliament.

The desirability of enacting suitable legislation was considered by the Indian Labour Conference held in October, 1952. The Indian Trade Union (Amendment) Act of 1960 made some changes in sections 2 (f), 3, 4, 6, 14, 16 and 28 of the Act. By the Indian Trade Union (Amendment) Act of 1964 the word 'Indian' has been deleted from the Act.

Sec. 2. Definitions

Appropriate Government.—The expression "Appropriate Government" has been defined in relation to the objects of the Trade Union. In relation to a Trade Union whose objects are not confined to one State, the "Appropriate Government" is the Central

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Government. In relation to all other Trade Unions the State Government is the Appropriate Government.

(a) Executive.—"Executive" means the body to which the management of the affairs of a Trade Union is entrusted. By what name the managing body is known, is immaterial. Thus the only requirement for any body to be "executive" under this clause is that it should be responsible for managing the affairs of a Trade Union. Where the executive committee of the Union constituted for 'management of the Union, and execution of its policy' resolved to espouse the cause of an individual employee it was held that the objects of the committee are wide enough to cover this resolution.[1]

(b) Office Bearers.—In case of a Trade Union the expression 'office bearers' includes any member of the executive of the Trade Union. But an auditor is not deemed to be an office bearer of the Trade Union.

(c) Prescribed.—"Prescribed" means prescribed by regulations made under this Act.

(d) Registered Office.—"Registered Office" means that office of a Trade Union which is registered under this Act as the head office of such Trade Union.

(e) Registered Trade Union.—"Registered Trade Union" means a Trade Union registered under this Act.

(f) Registrar.—As provided in section 2 (f) Registrar means :—

(i) a Registrar of Trade Unions appointed by the appropriate Government under section 3. Registrar also includes an Additional or Deputy Registrar of Trade Unions, and

(ii) in relation to any Trade Union, the Registrar appointed, for that State in which the head or registered office of the Trade Union is situated.

(g) Trade Dispute.—The expression "Trade Dispute" has been defined in the first part of section 2 (g) of this Act in relation to parties and the nature of the dispute. "Trade Dispute" means any dispute—

(1) (a) between employer and workmen ; or
(b) between workmen and workmen ; or
(c) between employers and employers.

(2) Any such dispute must be connected with :—
(i) the employment ; or
(ii) non-employment ; or
(iii) the terms of employment ; or
(iv) the conditions of labour, or any person.

The definition of 'Trade Dispute' in this Act is almost identical with the definition of "Industrial Dispute" in the Industrial Disputes Act. For a trade dispute it is necessary that there must be some difference between the parties as aforesaid, that is, a demand from one party and refusal to accept those demands by the other party. There can be no dispute by the unilateral action of one party ; which means the demand must be communicated to the other party. No trade dispute can be said to have arisen unless an opportunity to the other party is given to express any view or indicate any positive or negative relation thereto.[2] Further the dispute must be real and substantial between the parties to such dispute. Unless parties to the dispute have a direct or substantial interest in the employment, non-employment, or conditions of labour of the person regarding whom the dispute is raised, it cannot be said to be a real and substantial dispute between them.[3] Where the workmen of a tea estate raised a dispute regarding the termination of

1. *M.L. Garg* v. *Labour Court, Meerut*, 1970 Lab. I.C. 522 (All.)
2. *C.P. Saraiah* v. *State of Madras*, A.I.R. 1951 Mad. 191.
3. *Workmen of D.T.E.* v. *Management of D.T.E.*, A.I.R. 1958 S.C. 353.

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service of a person belonging altogether to different category from them, the Supreme Court held that there was no industrial dispute within the meaning of law as the appellant workman had no direct or substantial interest in his employment or non-employment even if he was a member of the Trade Union.[1] Where the workmen of an oil company made a demand to treat the labourers employed through contractors as regular workmen of the company, the Supreme Court held that the "matter is certainly of some importance to the workmen and in the circumstances it could not be said that the dispute was not a real and substantial dispute between the company and its regular workmen."[2]

Individual Dispute and Trade Dispute.—As observed by the Supreme Court, an individual dispute cannot *per se* be a trade dispute unless the cause is sponsored by a Trade Union or by a substantial number of workmen.[3] It is not necessary that it should be supported by all or majority of the workmen, but it should have the support of substantial section of workmen of the establishment. It is not the arithmetical majority of the workmen but the substantiality of their number taking up the cause, which is to be considered. It does not matter that the dispute is not raised by a majority of the workmen.[4] An industrial dispute may be raised by a group of workmen who may not represent all or even the majority of workmen, and if the dispute is referred to the Industrial Tribunal for adjudication and an award is made, it binds not only the parties to the dispute, or other parties summoned to appear ; but all persons who were employed in the establishment, or who would be employed in future are also governed by the award.[5]

Employment and non-employment.—The use of the expression "employment or non-employment" in the Act makes it clear that the dispute may be connected with the workman in employment or out of employment. That means a dispute connected with a dismissed, discharged, removed or retrenched employee is a Trade Dispute. It has been observed by the Federal Court that reinstatement is connected with non-employment and is, therefore, within the words of the definition.[6] So also, a claim for compensation for wrongful dismissal being connected with the question of non-employment is a Trade Dispute.[7]

Workmen.—The latter part of section 2 (g) of this Act defines "workmen" as follows :—

"Workmen" means all persons employed *in trade or industry* whether or not in the employment of the employer with whom the Trade Dispute arises. This definition has two ingredients :

(1) "Workmen" means all persons employed in trade or industry.

(2) It is immaterial that the persons employed in a trade or industry are not in the employment of the employer with whom the Trade Dispute arises.

The word "trade" has not been defined in the Act. So also the word "industry" although not defined in this Act, is defined in section 2 (j) of the Industrial Disputes Act. Industry may be said to be an activity systematically or habitually undertaken for the production or distribution of goods or for rendering of material services to the

1. *Workmen of D.T.E.* v. *Management of D.T.E.*, A.I.R. 1958 S.C. 353.
2. *The Standard Vacuum Refining Co.* v. *Their Workmen*, A.I.R. 1960 S.C. 948.
3. *Newspapers Ltd.* v. *State Industrial, Tribunal, U.P.*, A.I.R. 1957 S.C. 532.
4. *Sisir Kumar Shah* v. *J.N. Majumdar*, A.I.R. 1955 Cal. 309.
5. *Associated Cement Companies Ltd.* v. *Their Workmen*, A.I.R. 1960 S.C. 777.
6. *Western India Automobile Association* v. *Industrial Tribunal*, A.I.R. 1949 F.C. 111.
7. *The Indian Paper Pulp Co. Ltd.* v. *The Indian Paper Pulp Workers Union*, A.I.R. 1949 F.C. 148.

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community at large or part of such community with the help of the employees.[1] In the same case it has further been observed that industrial activity involves the co-operation of the employer and the employees and its object is the satisfaction of material human needs.[2] The definition of "workmen" embraces in it a dismissed, discharged, removed or retrenched employee also. Further, the workmen must be employed in trade or industry, whether under the same employer with whom the dispute arises or under a different employer connected with the same or similar industry.

(h) Trade Union.—Section 2 (h) defines "Trade Union" which can be analysed into the following ingredients :

(1) Any combination whether temporary or permanent ;

(2) The combination should have been formed for the purposes of :

(a) regulating the relations between :

(i) workmen and employers ; or

(ii) workmen and workmen ; or

(iii) employers and employers ; or

(b) imposing restrictive conditions on the conduct of any trade or business. But this Act shall not affect :

(i) any agreement between partners as to their business ; or

(ii) any agreement between an employer and those employed by him as to such employment ;

(iii) any agreement in consideration of the sale of the goodwill of a business or instruction in any profession, trade or handicraft.

A Trade Union is a continuous association of wage earners for the purpose of maintaining the conditions of their lives.[3] But the statutory definition given in the Trade Unions Act, 1926 uses the expression 'combination' instead of 'association' used in Sydney's definition. The word 'combination' carries a very wide meaning. Whatever may be the 'combination' if it is for one or the other of the statutory objects (as provided in this Act) it is Trade Union. It is the primary object of an association which determines its nature. A society consisted of authors, publishers and other owners of copyright and was formed for the protection of copyright in music and songs. There were also certain rules which could be regarded as imposing certain restrictions on the trade of the individual music publishers who became members of the association. The society was held by the House of Lords to be not a Trade Union because the principal object of the society was the protection of the copyright.[4] It was further held that, to come within the statutory definition, restrictive conditions imposed must be in respect of trade or business in general and imposition of such conditions on particular members of a trade or business will not suffice.[5] Tamil Nadu N.G.O. Union included among its members Sub-Magistrates of the Judiciary, Tahsildars, officers incharge of Treasuries and Sub-Treasuries, officers of Civil Court establishment, and the Home-Department of Government. Their union could not be recognised as a Trade Union for these persons were civil servants engaged in the task of the sovereign and regal aspects of the Government which were its inalienable functions.[6]

In *Food Corporation of India Staff Union* v. *Food Corporation of India and others*,[7] it was held that where more than one unions claim representative character, the

1. *State of Bombay* v. *Hospital Mazdoor Sabha*, A.I.R. 1960 S.C. 610.
2. *Ibid.*
3. Sydney and Beatrice Webb, History of Trade Unions.
4. *Performing Right Society* v. *London Theatres of Varieties*, 1924 A.C.I.
5. *Ibid.*
6. *Tamil Nadu N.G.O. Union* v. *Registrar Trade Unions*, A.I.R. 1962 Mad. 234.
7. (1995) 2 Labunion L.J. 272 (S.C.)

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method of secret ballot should be adopted to ascertain the correct position as regards the membership of different Trade Unions.

It was held in *National Organisation of Bank Workers' Federation of Trade Unions* v. *Union of India & others*,[1] that where a federation of trade unions is not registered it is not a trade union under the Act. It is not a juristic person and is not competent to raise a demand on behalf of employees which can fall in the ambit of industrial dispute. It cannot file a writ petition.

Sec. 14. Certain Acts not to apply to registered Trade Union.—The following Acts shall not apply to any registered Trade Union, and the registration of any such Trade Union under any such Act shall be void. The Acts are as follows :—

(i) The Societies Registration Act, 1860 ;

(ii) The Co-operative Societies Act, 1912 ;

(iii) The Companies Act, 1956.

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1. (1993) 2 Lab LJ 537 (Bombay).

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CHAPTER II
REGISTRATION OF TRADE UNIONS

Sec. 3. Appointment of Registrars.—The appropriate Government shall appoint a person to be the Registrar of Trade Unions for each State. The appropriate Government is also authorised to appoint Additional and Deputy Registrars of Trade Unions. They shall work under the superintendence and direction of the Registrar. The Appropriate Government shall by an order specify and define the local limits within which any Additional or Deputy Registrar shall exercise and discharge his powers and functions. The Additional and Deputy Registrar shall exercise and discharge such powers and functions of the Registrar as may be specified by an order issued by the appropriate Government. If any such Additional or Deputy Registrar is appointed and exercises and discharges the powers and functions of a Registrar in an area within which the registered office of a Trade Union is situated, he shall be deemed to be Registrar in relation to the Trade Union for the purposes of this Act.

Sec. 4. Mode of Registration.—A Trade Union may be a registered, unregistered or a recognised Trade Union. There is basic distinction between these different Trade Unions. The members of a recognised and registered Trade Union enjoy such benefits as the members of an unregistered Trade Union do not.

Any seven or more members of a Trade Union may apply for registration of the Trade Union. All the members applying for registration must subscribe their names to the rules of the Trade Union and also comply with the provisions of the Act relating to registration of Unions. If more than half of the members who applied for registration of Trade Union, cease to be members of the Trade Union or dissociate themselves from the application by giving a notice in writing to the Registrar before the registraton is granted to the Trade Union, the application shall be deemed to have become invalid. In all other cases when only half or less than half of the members cease to be members of the Union or dissociate themselves from the application as aforesaid, the application for registration shall be valid.

Sec. 5. Application of Registration.—According to the provisions of the Act a Trade Union may become a registered Trade Union in the following manner :

(1) An application should be sent to the Registrar in which seven or more members of such Union must subscribe their names. At least seven members must subscribe names to the rules of the Trade Union.

(2) The application in form "A" should be accompanied with a copy of rules of the Trade Union and a statement of the following particulars :—

(a) the names, occupations, and addresses of the members making the application ;

(b) the name of the Trade Union and the address of its head office ; and

(c) the titles, names, ages, addresses and occupations of the office bearers of the Trade Union.

(3) A general statement of the assets and liabilities of the Trade Union prepared in the prescribed form and containing such particulars as may be required should be sent with the application to the Registrar where a Trade Union has been in existence for more than one year before the making of an application for its registration.

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Sec. 6. Provisions to be contained in the rules of a Trade Union.—Every registered Trade Union is required to have written rules dealing with certain matters specified in Schedule II of the Central Trade Union Regulations, 1938. These rules generally determine and govern the relationship between the Trade Union and its members. They also provide guidance for the internal administration of the Trade Union. A Trade Union shall be entitled to registration under this Act, if :—

(1) the executive of the Trade Union is constituted in accordance with the provisions of this Act ; and

(2) the rules of Trade Union provide for the following matters, namely :

(a) the name of the Trade Unions ;

(b) the whole of the objects for which the Trade Union has been established ;

(c) the whole of the purposes for which the general funds of the Trade Union shall be applicable, all of which purposes shall be purposes to which such funds are lawfully applicable under this Act ;

(d) the maintenance of a list of the members of the Trade Union and adequate facilities for the inspection thereof by the office bearers and members of the Trade Union.

(e) the admission of ordinary members who shall be persons actually engaged or employed in an industry with which the Trade Union is connected and also the admission of the number of honorary or temporary members as office bearers required under section 22 to form the executive of the Trade Union ;

(f) the payment of a subscription by members of the Trade Union which shall be not less than twenty-five naye paise per month per member ;

(g) the conditions under which any member shall be entitled to any benefit assured by the rules and under which any fine or forfeiture may be imposed on the members ;

(h) the manner in which the rules shall be amended, varied or rescinded ;

(i) the manner in which the members of the executive and the other office bearers of the Trade Union shall be appointed and removed ;

(j) the safe custody of the funds of Trade Union, and annual audit, in such manner as may be prescribed, of the accounts thereof, and adequate facilities for the inspection of the account books by the office bearers and members of the Trade Union ; and

(k) the manner in which the Trade Union may be dissolved.

In *I.T. Commr. W.B.* v. *I.S. Mills Assen.*,[1] Indian Sugar Mills Association was a registered Trade Union. Rules 4 and 64 were repugnant with each other. It was submitted that Rule 64 should be treated as void as it was inconsistent with the stated objects of the Union. It was held that the Court had no right to assume some of the stated objects of the Association as primary to declare others in apparent conflict with them as of no effect. All rules framed by the Association co-exist. Further the Court had no right to re-write the rules of a registered Trade Union by deleting any of them.

In *M.T. Chandersenan* v. *Sukumaran*,[2] it was held that if subscriptions are not paid in accordance with the bye-laws of the Trade Union, persons who have failed to pay cannot be considered as members of the Union. But subscriptions should not be refused under some pretext which results in denial of membership.

1. A.I.R. 1975 S.C. 506.
2. A.I.R. 1974 S.C. 1789.

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In *Indian Oxygen Ltd.* v. *Their Workmen*,[1] the dispute regarding workmen of one factory represented by their Union and company was referred to the Tribunal. The membership of the Union was limited to workmen of that factory. It was alleged that the Constitution of the Union was amended so as to embrace workmen of other factories of the company and the name of the Union was changed before reference. But the amendment was not effected according to the provisions of the Act. It was held that the award of the Tribunal could not extend to workmen of other factories.

In *B.S.V. Hanumantha Rao & Another* v. *Deputy Registrar of Trade Union and Deputy Commissioner of Labour & others*,[2] the rules of Hyderabad Allwyn Workers' Union were amended to provide for making the President of the Union as election authority, empowering him to nominate all office bearers and denying authority to the general body to remove the President from office before expiry of his term. These amendments were registered by the Registrar. It was held that the amendments were contrary to the letter and spirit of the Trade Union Act. The President who is vitally interested in the conduct of elections cannot be the person who can be entrusted with the authority to prepare the voters list, appoint Returning Officer and conduct elections. It is a case of a person being given the authority to perpetuate himself in office. Such a procedure amounts to constituting a person a judge in his own cause.

Sec. 7. Power to call for further particulars and to require alteration of name.—The registration of a Trade Union will be refused by the Registrar if the name under which a Trade Union is proposed to be registered is identical with that of any existing Trade Union or so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union. In such a case the Registrar may require the persons applying for such registration to change the name of the Trade Union, and it shall be registered only after such alteration.

The Registrar may also ask for further information which he thinks necessary for the purpose of satisfying himself that the application complies with the provisions of sections 5 and 6 of the Act. On application for registration being made the Registrar may call for further information for the purpose of satisfying himself that the application complies with the provisions of this Act. Such information may be asked for only from the applicant and not from any other source.[3]

Sec. 8. Registration.—The Registrar will register the Trade Union if he is satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration. The Registrar shall register the Trade Union by making necessary entries in the register, to be maintained in such form as may be prescribed. The particulars relating to the Trade Union contained in the statement accompanying the application for registration shall be entered in the register.

The workmen of an industrial establishment can form as many Unions as they like. There is nothing in the Act that bars the formation of rival Unions or requires a Union applying for registration to give notice to all existing Unions.[4] When a Union seeks registration, all that it has to do is to ensure that the provisions of the Act, Rules and Regulations made thereunder relating to registration of Trade Union have been complied with.

It was held in *IFFCO, Phulpur Karmchari Sangh* v. *Registrar of Trade Unions and others*,[5] that once the trade union is registered by the Registrar of Trade Unions under Section 8 of the Trade Unions Act, 1926, certificate of Registration continues to

1. A.I.R. 1969 S.C. 306.
2. (1988) 1 Lab. L.J. 83 (A.P.).
3. *Kondal Rao* v. *Registrar, Trade Unions*, 1952 M.L.J. Notes on cases, p. 15.
4. *Keshargan Rayon Workers Union* v. *Registrar of Trade Unions*, 1988 Lab. I.C. 1939 (Cal.).
5. (1992) 2 LLJ 239 (All).

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hold good until it is cancelled. The action of the Registrar of Trade Unions registering the change of names of office bearers of a union does not amount to registration of trade union.

Where the Registrar takes no action on an application for more than three months, a writ under Art. 226 can be issued commanding the Registrar to deal with the application.[1] Where different set of office bearers are filed by rival group in a Trade Union the Registrar has no power to hold a quasi-judicial inquiry. He has no power for adjudication although he is given quasi-judicial power in registering the Trade Union or in their cancellation. He has an administrative duty to record changes in office bearers under section 8 read with section 28. In exercising this function the Registrar can only reasonably enquire to discover whether the changes to be recorded conform to actual facts and rules.[2] But this power cannot convert his inquiry into quasi-judicial proceeding in which each side has the right to lead evidence and cross-examine witnesses.[3] He can hold a summary inquiry for his own satisfaction.

In *Chemosyn (P) Ltd. & others* v. *Kerala Medical and Sales Rerepresentatives Association*,[4] it was held that a Trade Union registered under the Act is not a statutory body. It is not created by statute or incorporated in accordance with the provisions of a statute. The activities of the Trade Union are not closely related to Governmental functions and are not of public importance. Therefore a Trade Union is not amenable to writ jurisdiction as it is not covered by "other authorities" in Article 12 of the Constitution.

In *O.N.G.C. Workmen's Association* v. *State of West Bengal and others*,[5] it was held that the Registrar of Trade Union has no quasi-judicial authority to hold any inquiry by allowing parties to examine witnesses and to decide the dispute as to who are the real office-bearers. Where two rival groups claim to be office bearers of a Union the scope of inquiry is limited and an order passed by the Registrar in this regard is administrative in nature. To decide a dispute of this nature an inquiry may be held by the Registrar in presence of both parties.

In *Fateh Solanki and others* v. *Rashtriya Mill Mazdoor Sangh and others*,[6] two rival groups claimed to be office bearers of Union. It was held that the dispute is not a trade dispute under section 2 (g) and it is in the nature of a private dispute which can be adjudicated upon by the Civil Court only and not by the Registrar under the Act. He can only make a reasonable inquiry within the scope of sections 8 and 28 of the Act to ascertain as to who are the elected office bearers and to register their names. The Registrar under section 28 does not discharge any quasi-judicial functions but he discharges only administrative functions.

Sec. 9. Certificate of registration.—The Registrar on registering a Trade Union shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the Trade Union has been duly registered under this Act.

Functions of Registrar.—The primary function of the Registrar is to examine the applications made to him for registration and look at the objects of the Union for which it may be formed. On compliance of statutory conditions as provided in the Act, he shall grant registration certificate to the Union. As a matter of principle, the Registrar has no power to declare the election of office bearers of a Union unconstitutional. But where

1. *A.C.C. Rajanka Limestone Quarries Mazdoor Union* v. *Registrar of Trade Union*, A.I.R. 1958 Pat. 470.
2. *North-East Rly. Mazdoor Union* v. *Registrar of Trade Union*, 1969 Lab. I.C. 209 (All.).
3. *Ibid.*
4. (1988) 2 Lab. L.J. 43 (Kerala).
5. (1988) 2 Lab. L.J. 335 (Cal.).
6. (1994) 1 Lab. L.J. 294 (Raj.).

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the petitioner has himself submitted to the jurisdiction of the Registrar by requesting him to make an enquiry, he cannot subsequently be allowed to raise an objection that the Registrar acted without jurisdiction, for once he had availed the opportunity of getting a favourable order from the Registrar, he was estopped from challenging the jurisdiction of the Registrar if the result of the inquiry happened to be against him.[1] The Registrar shall be fully within his jurisdiction if he makes an inquiry about the legality of the new election of the office bearers of a Trade Union for the purpose of maintaining a register showing the name of the office bearers who may at the appropriate time be required to comply with the provisions of the Act. The acceptance or non-acceptance by the Registrar of the election of the office bearers of a Union is legal only for the purpose of maintenance of records in his office to facilitate the administration of the Act, but is open to challenge in the law court.[2]

In re *Indian Steam Navigation Workers Union*,[3] the Registrar refused to register the Union for the application made for registration was said to be an attempt to have another Union. While passing the order rejecting the application, the Registrar relied on a letter written by the Secretary of the Union to the Bengal Government, wherein it was stated that he had been directed by the General Body of the other Unions to approach the Government and request that the notification under section 16 of Criminal Law (Amendment) Act, declaring the other Union as unlawful association be withdrawn. The Registrar appeared to have acted on the basis of the letter without bringing it into the notice of the Union or without giving an opportunity to the Union of expressing its views on the statements in that letter. An appeal under the provisions of the Act was made by Union, praying that the Registrar may be asked to show cause, why the order made by him refusing to register the Union should not be set aside and the Union be registered. The Calcutta High Court held as follows :—

"It was the duty of the Registrar to examine the application and to look at the objects for which the Union was formed. If these objects were objects set out in the Act and if these objects did not go outside the objects prescribed in the Act and if all the requirements of the Act and Regulations made thereunder had been complied with, it was his duty to register the Union. The Registrar was not at that stage entitled to go into the question whether the Union was another Trade Union which was registered and which was seeking the registration under a different name. The Registrar when he relied on the letter to the Bengal Government ought to have brought it to the notice of the Union before he acted on it and given it an opportunity to say anything that it had to say with regard to it."[4]

In *North-Eastern Railway Employees' Union and others* v. *Third Addl. District Judge Farrukhabad and others*,[5] the Supreme Court held that the High Court cannot designate the General Manager of a railway as the authority to hold the elections. The Registrar of Trade Unions is the proper authority charged with the duty of supervising the elections or administering the provisions of the Act.

Sec. 10. Cancellation of Registration.—Power to withdraw or cancel registration of a Trade Union is given to the Registrar. The Registrar can exercise his power in the following cases :—

(1) On the application of the Trade Union to be verified in the prescribed manner.

(2) If the Registrar is satisfied that the certificate of registration has been

1. *Mukund Ram Tanti* v. *S.I. Raza, Registrar, Trade Unions, Bihar*, A.I.R. 1962 Pat. 338.
2. *Ibid.*
3. A.I.R. 1936 Cal. 57.
4. *In re* Indian Steam Navigation Workers Union, A.I.R. 1936 Cal. 57.
5. (1988) 2 Lab. L.J. 332 (S.C.).

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obtained by fraud or mistake.

(3) Where the Trade Union has ceased to exist.

(4) If the Union has wilfully and after notice from the Registrar contravened any provisions of this Act or allowed any rule to continue in force which is inconsistent with the provisions of the Act.

(5) Where the Union has rescinded any rule providing for any matter provision for which is required to be made by section 6.

The Registrar on receiving an application from the Union for withdrawal or cancellation of registration must before granting the prayer, satisfy himself that the withdrawal or cancellation of registration was approved by a general meeting of the Trade Union or if it was not so approved it had the approval of the majority of the members of the Trade Union. For this purpose he may call for such further particulars as he thinks necessary and may also examine any officer of the Union.[1]

Except when the registration is withdrawn on an application by the Union itself, the Registrar must give to the Trade Union not less than two months' previous notice in writing specifying the ground on which it is proposed to withdraw or cancel the certificate of registration. It is quite clear from the provisions of section 10 of this Act that no such notice as aforesaid by the Registrar to the Union is necessary, when the registration is withdrawn or cancelled on an application by the Union itself.

It was held in *Tata Electric Companies Officers Guild* v. *Registrar of Trade Unions*,[2] that for cancellation of registration of a trade union wilful contravention of provision of the Act is necessary. Therefore where a trade union did not file return due to misunderstanding of accounting year and the return was filed soon after receipt of show cause notice from the Registrar, the cancellation of registration on the ground of non-filing of return was held improper.

Sec. 11. Appeals.—A limited right of appeal from the decisions of the Registrar is granted by section 11 of the Act. Any person aggrieved by the refusal of the Registrar to register a Trade Union or by the withdrawal or cancellation of a certificate of registration has the right of appeal. The appeal should be preferred within the prescribed period. The proceedings by way of appeal must be started within sixty days of the date on which the Registrar passed the order against which appeal is made.[3]

The expression "High Court" used in section 11 of the Indian Trade Unions Act means and includes the High Court in its original as well as appellate jurisdiction.[4] The appeal shall be made :—

(a) where the head office of the Trade Union is situated within the limits of a Presidency town to the High Court ; or

(b) where the head office is situated in any other area, to such court, not inferior to the court of an additional or assistant judge of a principal Civil Court of original jurisdiction, as the appropriate Government may appoint in this behalf for that area.

The appellate court may dismiss the appeal or pass an order directing the Registrar to register the Union and to issue a certificate of registration. It may also set aside the order for withdrawal or cancellation of the certificate. The Registrar shall comply with any such order passed by the appellate Court.

For the purpose of an appeal under sub-section (1) of section 11 an Appellate

1. Central Trade Union Regulation, 1938 R. 6.
2. (1994) 1 Lab. L.J. 125 (Bom).
3. Central Trade Union Regulation, 1938 R. 10.
4. *Mihir Kumar Guha* v. *Registrar of Trade Unions, West Bengal, Calcutta*, A.I.R. 1961 Cal. 165.

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Court shall, so far as may be, follow the same procedure and have the same powers as it follows and has when trying a suit under the Code of Civil Procedure, 1908. The Appellate Court may also direct by whom the whole or any part of the costs of the appeal shall be paid and such cost shall be recovered as if they had been awarded in a suit under the Civil Procedure Code, 1908. These powers include the power to summon witnesses, compel production of documents, of making orders for discovery and inspection and so on. In the event of the dismissal of an appeal by some local court exercising original jurisdiction, the person aggrieved shall have a right of appeal to the High Court. When an appeal is so made to the High Court, it shall have all the powers of an Appellate Court stated above.

There is some anomaly in the provisions of section 11 of the Trade Unions Act, 1926. It is clear from the provisions of this section that a Trade Union having its head office situate within limits of a Presidency Town shall have only one right of appeal against the decision of the Registrar refusing to register such Trade Union. But a Trade Union having its head office situated within the mufassil, shall have two rights of appeal against the decision of the Registrar. It cannot go directly to the High Court, but shall first move the local court exercising original jurisdiction and then prefer an appeal against the decision of the local Court to the High Court.

Judicial notice of above position was first taken by the Calcutta High Court in *Registrar of Trade Unions, West Bengal* v. *Mihir Kumar Guha*,[1] wherein an appeal was made against an order of a single judge allowing an appeal under section 11 (1) (a) of the Indian Trade Unions Act, 1926, against the order of the Registrar of Trade Unions, West Bengal, cancelling the certificate of registration granted to the Employee's State Insurance Corporation Employees' Union. The respondents raised three objections, namely :—

(i) no appeal from the decision of a single Judge is provided under section 11 (1) (a) of the Act ; and

(ii) the judgment pronounced by the single Judge was itself in the exercise of appellate jurisdiction. Therefore it was not appealable ; and

(iii) the case was not declared by the judge as fit one for appeal.

The Court fully agreed with the contention of the respondent that second appeal is not provided for in the Trade Unions Act, 1926, but held the appeal to be competent under the provisions of clause 15 of the Letters Patent.[2]

In *Mukand Iron & Steel Works Ltd.* v. *V.G. Deshpande, Registrar of Trade Unions Bombay*,[3] the registration of the Trade Union was cancelled for contravention of the provisions of section 28 by failing to send annual return. Later on Registrar of Trade Unions withdraw the cancellation of registration on the ground that returns have been submitted subsequently. Therefore, the question for consideration was whether the Registrar had the power to withdraw the cancellation of registration. It was held that a Trade Union whose registration has been cancelled has remedies in the form of an appeal or in the form of an application for fresh registration. If the appeal succeeds the order of cancellation could be held to be *void-ab-initio* and the union would continue as if order of cancellation has not been passed. If fresh registration is permitted it would operate from the date thereof. Once the Registrar cancels or withdraws the registration of a Trade Union he has no power to review it and he cannot withdraw that order because of subsequent events. Hence the order of the Registrar withdrawing the cancellation order is without jurisdiction.

1. A.I.R. 1963 Cal. 56.
2. A.I.R. 1963 Cal. 56.
3. (1986) 2 Lab. L.J. 290 (Bom.)

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Sec. 12. Registered office.—All communications and notices to a registered Trade Union may be addressed to its registered office. Notice of any change in the address of the head office shall be given within fourteen days of such change to the Registrar in writing. The change in address shall be recorded in the register referred to in section 8 of the Act.

Sec. 13. Incorporation of registered Trade Union.—A Trade Union after registration becomes entitled to the following advantages :—

(1) It becomes a body corporate by the name under which it is registered.

(2) It gets perpetual succession and common seal.

(3) It can acquire and hold both movable and immovable property.

(4) It can contract through agents.

(5) It can sue and be sued in its registered name.

An unregistered Trade Union could not be sued in Tort by suing a member thereof in a representative capacity. The proper course in such a case was to sue a member for any cause of action that lay against that member and it was not intended anywhere that such a suit, would in any way be improper.[1] Therefore an unregistered Trade Union is only a voluntary association of individuals having no corporate existence. It is not a legal entity. An unregistered Trade Union cannot be sued and any appearance of officials on its behalf before the Court is not right. Therefore any person aggrieved by a wrong committed by the members of such a Union should bring an action against all persons personally who were members of the Union at the time of the commission of alleged wrong ; or in case the members are in a large number, leave to sue them through a few to represent them may be obtained under the Civil Procedure Code provided they have common interest in resisting the claim.[2]

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1. *Hardie and Lane Ltd.* v. *Chilton*, (1928) 1 K.B. 663.
2. *Campbell* v. *Thompson*, (1953) 1 Q.B. 445.

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CHAPTER III
RIGHTS AND LIABILITIES OF REGISTERED TRADE UNIONS

Sec. 15. Objects on which general funds may be spent.—Section 15 of the Act is in the form of general restraint against expenditure of the general funds of a Trade Union. The general funds of a registered Trade Union shall not be spent on any other objects than the following, namely :—

(a) the payment of salaries, allowances and expenses to office bearers of the Trade Union ;

(b) the payment of expenses for the administration of the Trade Union including audit of the accounts of the general funds of the Trade Union ;

(c) the prosecution or defence of any legal proceeding to which the Trade Union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of security or protecting any rights of the Trade Union as such or any rights arising out of the relation of any member with his employer or with a person whom the member employs.

(d) the conduct of the trade disputes on behalf of the Trade Union or any member thereof ;

(e) the compensation of members for loss arising out of trade disputes ;

(f) the allowances to members or their dependants on account of death, old age, sickness accidents or unemployment of such members ;

(g) the issue of, or the undertaking of liability under policies of assurance on the lives of members, or under policies insuring members against sickness, accident or unemployment ;

(h) the provision of educational, social or religious benefits for members (including the payment of the expenses of general or religious ceremonies for deceased members) or for the dependants of members ;

(i) the upkeep of a periodical published mainly for the purpose of discussing questions affecting employers or workmen as such ;

(j) the payment in furtherance of any of the object on which the general funds of the Trade Union may be spent, of contributions to any cause intended to benefit workmen in general, provided that the expenditure in respect of such contributions in any financial year shall not at any time during that year be in excess of one-fourth of the combined total of the gross income which has upto that time accrued to the general funds of the Trade Union during that year and of the balance at the credit of those funds at the commencement of that year ; and

(k) subject to any conditions contained in the notification, any other object notified by the appropriate Government in the Official Gazette.

Thus it will be illegal to spend the Union funds for any purpose other than those stated above. It is illegal to devote Union funds in support of an illegal strike or lockout and a Union can be restrained by injunction from applying its funds for any unlawful purpose, because such an expenditure shall be *ultra vires* of the Act.

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In *Gross* v. *British Iron Steel and Kindered Trade Association*,[1] a member of a Trade Union was injured by an accident, the particulars of which were supplied to the Secretary of the Union. Papers were forwarded by the Secretary to the legal adviser of the Union. The solicitor was of the opinion that there was no legal cause of action against employer. The legal advice was communicated to the injured workman and was also accepted by him. But when the period of limitation for claiming damages expired the member brought an action against the Union for failure to exercise proper care and diligence in pursuing his claim. It was held that the Union was not liable. The court pointing out the duties of the Trade Union towards its members observed that, "if the solicitor of the Union had advised that further inquiries should be made or that an action should be brought, the Union would have been under a duty to act accordingly. But in absence of any such direction from the Solicitor, the Union had fulfilled its duty by providing legal assistance which was adverse to claim."

In *Mario Raposo* v. *H.M. Bhandarkar and others*,[2] the petitioner as well as the respondents were members of a Union called V.C.O. Bank Employees' Association Nagpur. The office bearers of the union purchased shares of U.T.I. in their individual names out of the Union General Fund. It was held that purchase of shares cannot be termed as investment under section 15 of the Act but is a speculative activity. Section 15 of the Act does not allow to spend the fund of the union on speculative activity.

Sec. 16. Constitution of a Separate Fund for Political purposes.—A Trade Union can have such civic and political objects as are not inconsistent with its primary object. To pursue such objects it can raise separate funds. This section provides that a registered Trade Union may constitute a separate fund from contributions separately levied for or made to that fund. Out of this fund payments may be made for the promotion of the civic and political interests of its members in furtherance of any civic or political objects enumerated in section 16 of the Act. It is noteworthy that no expenditure for political purposes out of the general fund is permitted. The interests on investments, which constitute the political fund will belong to that fund, and that fund may be lawfully swelled by donations, subscriptions and so forth.[3]

Section 16 (2) declares the following as civic and political objects :—

(a) the payments of any expenses incurred, either directly or indirectly by a candidate or prospective candidate for election as a member of any legislative body constituted under the Constitution or of any local authority, before, during, or after election in connection with his candidature or election ; or

(b) the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate ; or

(c) maintenance of any person who is member of any legislative body constituted under the Constitution or of any local authority ; or

(d) the registration of electors or the selection of a candidate for any legislative body constituted under Constitution or for any local authority ; or

(e) the holding of political meetings of any kind, or the distribution of political literature or political documents of any kind.

Para (a) above refers mainly to election expenses and is so wide that it covers all expenses from the stage of preparation to the incidental expenses incurred after election. Para (b) permits expenditure for holding of any meeting or distribution of any literature or document in support of a candidate or prospective candidate for election as a member

1. (1968) Lab. I.C. 1626 (C.A.).
2. (1994) 2 Lab L.J. 680 (Bom.).
3. Sophania Trades Union Law and Practice, p. 184.

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of any legislative body, whether the nature of literature or document is political or not. Therefore any expenses incurred on a journal or newspaper containing matter in support of such candidate will also be covered. Para (c) is meant to maintain members of legislative bodies, and not to support candidates. It authorises expenses for housing, clothing, payment of allowances etc. to persons actually holding an office in a legislative body. Para (d) covers an expenditure on issue of notices, circulars and posters with a view to canvass registration of electors. So also expenditure on account of holding of selection conference for the purpose of selecting or securing the election of a candidate is also authorised under this para. Under para (e) any money spent on distribution of political literature whether to the members of the Union or to the general public is also covered.

Sub-section (2-A) of section 16 provides that in its application to the State of Jammu and Kashmir references in sub-section (2) to any legislative body constituted under the Constitution shall be construed as including references to the Legislature of that State.

It has to be borne in mind that no member shall be compelled to contribute to the political fund. Any member who does not contribute to the political fund of the Union shall not be excluded from any benefits of the Trade Union. He cannot be placed directly or indirectly under any disability or at any disadvantage in comparison to other members of the Trade Union, who have contributed to political fund. In other words no discrimination on the ground of a member having contributed or not to the political funds of the Trade Union shall be made. Further, contribution to the political fund cannot be made a condition for admission of a person to the Trade Union. However, the control of management of the political funds can exclusively be vested in the hands of only those members who have contributed to political funds. Non-contribution does not render a member ineligible for any office involving control or management but such a right cannot be pressed.

Sec. 17. Criminal conspiracy in Trade Disputes.—Section 17 of the Act confers immunity from liability in case of criminal conspiracy under section 120-B of the Indian Penal Code committed by an office bearer or member of a registered Trade Union. The protection provided to members or office bearers of a registered Trade Union is partial in the sense that the immunity is available only in respect of agreements made between the members for the purpose of furthering any legitimate object of the Trade Union as provided in section 15 of the Act. If the agreement is an agreement to do an act which is an offence, no immunity can be claimed. The effect of section 17 of the Act is that an agreement or combination of two or more members of the registered Trade Union to do or cause to be done any act in furtherance of a Trade dispute shall not be punishable as a conspiracy unless such act, if committed by an individual, constitutes an offence. Registered Trade Unions have certain rights to do in furtherance of their trade disputes, such as to declare strike and for that purpose to pursuade their members to abstain from their work.

In *West India Steel Company Ltd.* v. *Azeez*,[1] a Trade Union leader obstructed work in the factory for five hours protesting against deputation of workman to work in another section. It was held that a worker inside the factory is bound to obey the reasonable instructions given by his superiors and carryout the duties assigned to him. The mere fact that such worker is a Trade Union leader does not confer on him any immunity in that regard. A trade union leader has no right in law to share managerial powers and he cannot dictate any worker individually or to the workmen generally about the manner in which they have to do their work or discharge their duties. A Trade Union

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1 (1990) 2 Lab. L.J. 133 (Kerala).

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can espouse the cause of the workers and can resort to lawful agitations for condicating their rights but officials of Trade Union are not entitled to order a workman to stop his work or otherwise obstruct the work of the establishment. Where officials of a Trade Union obstruct the work the management is justified in proceeding against such worker and deal with him effectively.

Sec. 18. Immunity from civil suits in certain cases.—Section 18 of the Trade Unions Act deals with the immunity from civil proceedings afforded to a registered Trade Union, and to its members or office bearers. A person is liable in Torts for deliberately bringing about a breach of contract of employment between the employer and the employee. But a registered Trade Union, its members or office bearers are protected from being sued for inducing a person to break his contract of employment or for interfering with the trade, business or employment of some other person, provided such inducement is in contemplation or furtherance of a trade dispute.

Section 18 (1) of the Act provides that no suit or other legal proceeding shall be maintainable in any Civil Court against any registered Trade Union or any office bearer or member thereof in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispute of his capital or of his labour as he wills. In this sub-section emphasis is on the word "only" which means the protection is limited only to the grounds of actionability provided in this sub-section, and a registered union, its members or office bearers shall be liable for any act not covered by this clause. There shall be no immunity if threats, violence or other illegal means are employed.

Section 18 (2) of the Act provides that a registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without the knowledge of, or contrary to, express instructions given by the executive of the Trade Union.

It was held in *Ram Singh and others* v. *M/s. Ashoka Iron Foundary and others*,[1] that a suit for perpetual injunction restraining the workmen from indulging in unfair labour practice is deemed as one of civil nature and hence cognizable under Section 9 of the Civil Procedure Code. Therefore, where the court has barred the workmen from holding meeting, dharna and interfering in the rights of a company, such a restraint does not curtail the just trade union activities of the workers. It cannot be construed as unjust and the workmen are at liberty to carry on legitimate trade union activities peacefully.

It was held in *P. Mukundan and others* v. *Mohan Kandy Pavithran*,[2] that a strike, *per se*, would not be an actionable wrong. Further the office bearers, and the members of a registered trade union are immune against legal proceedings linked with the strike of the workmen by the provisions of Section 18 of the Trade Unions Act.

Rohtas Industries Staff Union v. *State of Bihar*,[3] is the leading case on this section. In this case the question for determination was, whether the employers have any right to claim damages against the employee participating in an illegal strike and thereby causing loss of production and business. Ramaswami, C.J. observed :—

"Upon consideration of the various provisions of the Act it is manifest that the overriding purpose of the Act is the benefit of the community and not the benefit of the employees or the employers. It is true that section 24[4] imposes a statutory duty on the

1. (1993) 1 Lab LJ 987 (P & H).
2. (1992) 2 Lab LJ 160 (Kerala).
3. A.I.R. 1963 Pat. 170.
4. Section 24 of the Industrial Dispute Act, 1947.

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employees not to commence or declare an illegal strike. But it is manifest that if there is a breach of this statutory duty on the part of the employees, the employer has no right of civil action against the employees in default apart from the statutory penalty provided by section 26 (1) of the Industrial Disputes Act, 1947. Similarly if the employer declares an illegal lockout there is a breach of the statutory obligation created by section 24 of the Industrial Disputes Act, 1947, but the employees have no right of civil action. The exclusive remedy open to them is criminal prosecution under section 26 (2) of the Act. For these reasons I hold that the duties imposed by sections 22, 23 and 24 of the Industrial Disputes Act are statutory duties owed by the employees, not to the employers concerned but duties owed of the public which can be solely enforced by criminal prosecution under section 26 (1) of the Act. It follows, therefore, that the employers have no right of civil action, for damages against the employees participating in an illegal strike within the meaning of section 24 (1) of the Industrial Disputes Act."[1]

In the above case it was further held that the striking workmen are not prevented from taking recourse to the protection of section 18 of the Trade Unions Act, 1926 mainly because the strike is illegal under section 24 (1) of the Industrial Disputes Act, 1947.[2] It is the duty of the court to see that the strike is undertaken in contemplation or furtherance of a trade dispute. But the expression "in contemplation or furtherance of" is not defined. For any act to be done in furtherance of a dispute, the dispute must be present or imminent and whether a trade dispute is actual, impending or probable is a question of fact in each case.[3]

In *Simpson & Group Companies Workers & Staff Union* v. *Amco Batteries Ltd.*[4] it was held that physical interference or duress with free movement of executives, contractors, staff, suppliers and other public or physically obstructing the free movement of cars, vehicles and lorries carrying raw materials, intermediaries, end products into and out of the factory premises could not be justified as a trade union right or a fundamental right under Article 19 of the Constitution. Immunity under section 18 of the Trade Union Act does not extend to the above activities. Right to picket is a very intangible one and is limited by the equal right of others to go about their lawful affairs free from objection or intimidation. The methods of persuation are limited to oral and visual methods and it does not extend to physical obstruction of a vehicle or person.

It was held in *Reserve Bank of India* v. *Ashis Kusum*[5] that in order to secure immunity from civil liability under section 18 inducement or procurement of breaches of contract of employment in furtherance of a trade dispute or interference with business of another person in furtherance of a trade dispute must be by lawful means and not by means which would be illegal or wrongful by other provisions of law. It was further held that the movement or agitation or demonstration by the employees for the purpose of compelling employer to withdraw certain disciplinary proceeding initiated against some of them was in contemplation or in furtherance of trade dispute and, therefore, not acceptable.[6] So also to threaten to induce breaches of contracts of employment is not actionable. But the inducement of breaches of contract must not be by unlawful means. Watching and besetting may in certain circumstances constitute unlawful means of procuring or inducing breaches of contract.[7]

In *Sri Ram Vilas Service Ltd. and others* v. *Simpson and Group Companies*

1. *Rohtas Industries Staff Union* v. *State of Bihar*, A.I.R. 1963 Pat. 170.
2. *Ibid.*
3. *Conway* v. *Wade*, 1909 A.C. 506.
4. (1992) 1 Lab. L.J. 266 (Karn.).
5. (1969) 73 Cal. W.N. 388.
6. *Ibid.*
7. *Ibid.*

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Workers Union and others[1] it was held that if cessation of work is the result of strike, the effect of strike will be nullified if the managements either by themselves or through their customers are permitted to remove the goods either manufactured by the managements or coming into custody of the management in the course of their trade. If the customers of the management are to be permitted to remove the goods by themselves without the aid of the labour that would tantamount to rendering the strike ineffective and to achieve that purpose the court should not lend its hand.

In *Western India Cine Employee's* v. *Filmalaya Pvt. Ltd.*,[2] the Union made various demands on behalf of 19 workers alleging that these workers were in the employment of the Filmalaya Pvt. Ltd. and they were shown as temporary employees of other sister concerns. The Federation issued a letter to various bodies and associations of Cine Artists, technicians and workers requiring them to issue directions to their members not to report for shooting work at the studio of the plaintiffs—the Filmalaya Pvt. Ltd. As a result their business came to a standstill. The plaintiffs, therefore, filed a suit requesting the Civil Court to grant injunction restraining the Trade Union from carrying on such activities. A number of remedies were claimed by the plaintiffs.

It was held by the High Court in appeal that a trade dispute existed and the trial court was wrong in coming to the conclusion that there was no existing trade dispute. Further, by issuing directions to its own members not to co-operate with the employer, no intimidation or coercion is caused which will result in denying them freedom of choice by any unlawful and violent means. What acts of a Trade Union are protected under section 18 depends on the facts of each case. It was further held that the acts of a Trade Union such as using abusive language towards the employers, their staff and visitors are subject to other laws of the land. A Trade Union is entitled to carry out its legitimate trade union activities peacefully and, therefore, *per se* slogan shoutings or demonstrations cannot be termed as unlawful and a blanket injunction cannot be granted.

It was held in *Ahmedabad Textile Research Association* v. *A.T.I.R.A. Employees Union and Another*,[3] that *dharnas* and demostrations, though they may cause inconvenience to the management, are permissible even inside the industrial establishment within the working hours so long as they do not turn out to be unlawful, tortious or violent. Therefore they cannot be curbed by orders of Civil Court and they would be covered by section 18 of the Act.

Sec. 19. Enforceability of agreement.—In India it is the general principle that an agreement in restraint of trade is void because it is opposed to or in violation of public policy.[4] The public in general have an interest in every person carrying on his trade or business freely. Therefore all restraints on individual liberty to trade are declared void on the grounds of policy. The above principle is affected by the provisions of section 19 of the Trade Unions Act, 1926. According to this section an agreement, between the members of a registered Trade Union in restraint of trade shall not be void or voidable. It means agreements, made between the members of a registered Trade Union not to accept employment unless certain conditions as to pay, hours of work etc., are fulfilled, will not be void or voidable.

There is an important proviso to this rule in section 19 itself which prevents Civil Courts from entertaining any legal proceeding instituted for the express purpose of enforcing or recovering damages for breach of any agreement concerning the conditions on which any members of a Trade Union shall or shall not sell their goods, transact

1. (1979) 2 L.L.J. 284 (Mad.).
2. (1981) 2 L.L.J. 393.
3. (1994) 2 Lab. L.J. 912 (Guj.).
4. Indian Contract Act, 1872, section 27.

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business, work, employ or be employed. In this sub-section the word 'express' is important. It means where the purpose of instituting the legal proceeding is not expressly to recover damages for breach of an agreement, it is enforceable. Further the disability created under the Act relates to the enforcement of an agreement, not to its validity, which means the courts can pronounce upon the meaning or validity of any agreement. It shall be competent for the courts to make a declaration as to the right of parties without granting a relief thereof. It was said in *Amalgamated Society of Carpenters* v. *Braithwaite*,[1] that it is totally a different proposition to say that a man claims to possess a right and that he seeks to enforce the obligations they create. The latter may be prevented under the statute, the former is not.

These provisions relate to a registered Trade Union. There may be a Trade Union not registered but lawful under the ordinary law. Agreements made between members of an unregistered lawful Trade Union are enforceable so long as they conform to general law of the contract. Any objection as to the jurisdiction of the court on grounds provided in section 19 can be taken by party to the action for the first time before an appellate court though not taken in the court below.[2]

Sec. 20. Right to Inspect Books of Trade Union.—Section 20 of the Act provides that the account books of a registered Trade Union and the list of members of Trade Union shall be open to inspection by an officer or member of the Trade Union at such times as may be provided for in the rules of the Trade Union. This section enables any person interested in the funds of the Trade Union to satisfy himself as to the genuineness of the accounts of the Trade Union. It is not necessary that the office bearer or any members of the Trade Union should personally inspect the accounts, instead he can appoint an agent for the purpose who shall communicate the results of the inspection only to his principal and to none else.

Sec. 21. Right of minors to membership of Trade Union.—Any person who has attained the age of fifteen years may be a member of a registered Trade Union. Any such member, subject to the rules of Trade Union, shall enjoy all the rights of a member and execute all instruments and give all acquaintances necessary to be executed or given under the rules. Although a person on attaining the age of fifteen years may become a member of the Trade Union, but in view of the disqualification laid down in section 21-A he cannot be an office bearer of the Trade Union until he attains the age of eighteen years.

The Trade Union being a voluntary association is free either to admit or to refuse a person as its member. The right of society to admit any person as its member is exercised in accordance with its regulations, and until so admitted, no right exists which the courts can be called upon to protect or enforce.[3] The courts have no power to require the Trade Union to admit a person when such admission has been refused. Therefore an application to join the Trade Union and an undertaking to abide by the rules of the Trade Union, its acceptance by the Union is all in the nature of an offer and acceptance resulting in contract between the members and the Union. The right and liabilities of the members of a Trade Union are generally determined by the constitution of such Union, which forms the basis of the contract.

Ordinary members of a Trade Union must be the persons actually engaged in the industry with which, Trade Union is concerned. A Trade Union has not only the right to admit a person as its member, but also to expel any of its members provided the rules of the Trade Union provide for such expulsion. Even where a provision is made in the constitution of a Trade Union whereby a member can be expelled by the Trade Union,

1. 1922 A.C. 44.
2. *Bucke* v. *Amalgamated Society of Dres*, (1906) Chancery 583.
3. *Mayer* v. *Journeyman Stone Cutters*, (1890) 47 N.J. liq. 519.

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such member must be given fair and adequate opportunity of being heard. The courts can interfere with the discretion of a union to expel any of its members for violation of rules either on the ground of the expulsion being not expressly authorised by the Union rules or the decision of expulsion by the Union being in violation of the principles of natural justice. Generally the rules of the Union make a remedial provision to be sought by an aggrieved member by way of appeal to domestic Tribunals because it is an internal matter of the Union itself. Where a provision for such remedy is made in rules, the courts have, before granting a remedy, to see that the aggrieved member had sought such remedy but failed to get justice.

Sec. 21-A. Disqualifications of office bearers of Trade Union.—A person shall be disqualified for being chosen as, and for being a member of the executive or any other office bearer of a registered Trade Union, if—

(i) he has not attained the age of eighteen years ;

(ii) he has been convicted by a Court in India of any offence involving moral turpitude and sentenced to imprisonment, unless a period of five years has elapsed since his release.

A member of the executive or other office bearer of a registered Trade Union who, before the commencement of the Trade Union (Amendment) Act, 1964, has been convicted of any offence involving moral turpitude and sentenced to imprisonment, shall on the date of such commencement cease to be such member or office bearer unless a period of five years has elapsed since his release before that date.

Thus the disqualifications of office bearers of a Trade Union are twofold. Any person below the age of 18 years being a minor cannot be an office bearer of a Trade Union. To disqualify any person from being an office bearer of a Trade Union under the latter clause there are three requirements, namely :—

(i) conviction by a Court for any offence involving moral turpitude. That means if the offence is not one involving moral turpitude there can be no disability ;

(ii) sentence to imprisonment. It means if the punishment is only pecuniary and not imprisonment, then too there can be no disqualification ; and

(iii) lastly a period of five years must not have elapsed since his release. That means the disability is not a permanent one but continues only for a period of five years after release.

Sec. 22. Proportion of office bearers to be connected with the industry.—Section 22 of the Act provides that not less than one-half of the total number of the office bearers of every registered Trade Union shall be persons actually engaged or employed in an industry with which the Trade Union is connected.

The appropriate Government may, by special or general order, declare that the provisions of section 22 of the Act shall apply to any Trade Union or class of Trade Unions specified in the order.

Appointment and removal of executive and office bearers of the Union.—The manner in which the members of the executive and other office bearers of the Union shall be appointed and removed are provided in the rules of a Trade Union framed in accordance with the Act. The powers and duties of office bearers are also provided by the rules. It is required by section 22 of the Act, as stated above, that at least half of the total number of office bearers of a registered Trade Union shall be persons actually engaged or employed in an industry with which the Trade Union is connected. The rest of the members may be honorary or temporary. Although a Trade Union has the right to remove any of its office bearers, but the power of removal must be exercised by the Union judiciously and the rules of natural justice must be followed. The following are

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some of the rules to be followed, namely :—

(i) the official sought to be removed must be supplied with sufficient grounds and reason for his removal so that he may defend himself ;

(ii) he must also be given the opportunity of appearing and defending himself against the charges ;

(iii) the decision of removal arrived at by the Union must be in good faith and after a fair hearing of the case.

Where the bye-laws limited the eligibility for election to Union offices only to those who had held offices it was held that the qualification prescribed was not reasonable since it rendered ninety-three per cent of the members ineligible to be elected to any union offices.[1]

Sec. 23. Change of name.—Section 7 (2) of the Act provides that no Trade Union shall be registered under the name identical with the name of any other existing Trade Union. Section 23 of the Act provides that any registered Trade Union may, with the consent of not less than two-thirds of the total number of its members and subject to the provisions of section 25 of the Act, change its name.

Sec. 24. Amalgamation of Trade Unions.—The method, for amalgamation of two or more Unions is provided for in section 24 of the Act. Any two or more registered Trade Unions may become amalgamated together as one Trade Union with or without dissolution or division of the funds of such Trade Unions. But to support any amalgamation the votes of at least one-half of the members of each and every such Trade Union entitled to vote must be recorded and also that at least sixty per cent of the votes recorded must be in favour of the proposal of amalgamation.

Section 25 of the Act requires that notice in writing of every amalgamation signed by the Secretary and by seven members of each and every Trade Union which is a party thereto shall be sent to the Registrar. Where the head office of the amalgamated Trade Union is situated in a different State, notice of amalgamation shall be sent to the Registrar of such State.

The Registrar of the State in which the head office of the amalgamated Trade Union is situated, shall, if he is satisfied that the provisions of this Act in respect of amalgamation have been complied with and the Trade Union formed thereby is entitled to registration under section 6, register the Trade Union in the manner provided in section 8 of the Act. The amalgamation shall have effect from the date of registration.

Sec. 25. Notice of change of name or amalgamation.—Section 25 (1) of the Act requires that notice in writing of every change of name signed by the Secretary and seven members of the Trade Union changing its name shall be sent to the Registrar. It should further be stated in the notice whether the consent of the members was obtained by referendum or by resolution of a general meeting. On receipt of a notice for change of name, the Registrar must satisfy himself that the provisions of the Act in respect of change of name are complied with. If the proposed name is identical with that by which any other existing Trade Union has been registered or in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall refuse to register the change of name.

The Registrar shall, if he is satisfied that the provisions of this Act in respect of change of name have been complied with, register the change of name in the register referred to in section 8. The change of name shall have effect from the date of such registration.

Sec. 26 (1). Effect of change of name.—The change in the name of a registered Trade Union shall not affect any rights or obligations of the Trade Union. It shall also

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1. *W. Willard Wirtz* v. *Hotel and Club Employees' Union*. A.I.R. 1969 S.C. 25.

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not render ineffective any legal proceeding by or against the Trade Union. Any legal proceeding which might have been continued or commenced by or against a Trade Union by its former name may be continued or commenced by or against its new name.

Sec. 26 (2). Effect of amalgamation.—Section 26 (2) of the Act provides that an amalgamation of two or more registered Trade Unions shall not prejudice any right of any of such Trade Unions or any right of a creditor or any of them.

An amalgamation shall have effect only after it has been registered. But registration of amalgamation by itself is not the conclusive proof of the validity of the amalgamation. The amalgamation may be declared invalid on the ground that the votes of fifty per cent of the members had not been recorded.[1]

Sec. 27. Dissolution.—Section 27 of the Act provides that when a registered Trade Union is dissolved, notice of the dissolution signed by seven members and by the Secretary of the Trade Union shall, within fourteen days of the dissolution, be sent to the Registrar. If the Registrar is satisfied that the dissolution, has been effected in accordance with rules of the Trade Union, the notice shall then be registered. The dissolution of a registered Trade Union shall have effect after registration of the notice.

Where the dissolution of a registered Trade Union has been registered and the rules of a Trade Union do not provide for the distribution of funds of the Trade Union on dissolution, the Registrar shall divide the funds amongst the members in such manner as may be prescribed.

If the rules of a Trade Union do not provide for dissolution of the Trade Union, then like any other voluntary association the dissolution is possible only with the consent of all the members or by an order of the court. The courts will not ordinarily interfere to dissolve against the wishes of the minority, unless it is practically impossible for the Union to function.[2] In *Free Church of Scotland* v. *Overtoun*[3] the majority of its members decided to unite the Free Church with another religious body against the wishes of the minority, to form a new church. The property of the Free Church was conveyed to trustees of the new church. The House of Lords held that as there was no power under the constitution of the Free Church for the majority to sanction a change involving modification of its doctrine, the property of the Free Church belonged to the dissentient minority who had remained members and adhered to their sectarian principles. As a general rule the courts shall not interfere with the contentions and quarrels of voluntary association so long as the government is fairly and honestly administered.[4] The jurisdiction of the Court is based on the need for protecting the proprietary interests of the members, which exist wherever there are common assets or funds or where subscriptions are payable by the members.[5]

Where it is necessary for the Registrar under section 27 (2) to distribute the funds of a Trade Union which has been dissolved, he shall divide the funds in proportion to the amounts contributed by the members by way of subscription during their membership.[6] Fines and forfeitures paid by member and benefits and similar payments received by them in accordance with the rules will usually not be taken into account.[7]

Sec. 28. Returns.—A general statement, audited in the prescribed manner of all receipts and expenditures of every registered Trade Union, during the year ending on 31st day of December shall be annually sent to the Registrar on or before a prescribed

1. *Booth* v. *Amalgamated Marine Worker's Union*, (1969) A.C. 904.
2. *Blacke* v. *Smither*, (1906) 22 T.L.R. 669.
3. (1904) A.C. 515.
4. *Lafond* v. *Deems*, 81 N.Y. 507.
5. *Regby* v. *Connol*, (1884) Ch. D. 487.
6. The Central Trade Union Regulations, 1938, R. 11.
7. *Cunnack* v. *Edwards*, (1895) 1 Ch. 489.

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date. A general statement of the assets and liabilities of the Trade Union existing on 31st day of December shall also be sent annually on the prescribed date to the Registrar. The statement shall be prepared in such form and shall comprise such particulars as may be prescribed.

Along with the general statement a statement showing all changes of office bearers made by the Union during the year to which the general statement refers, shall be sent to the Registrar. A copy of the rules of the Trade Union corrected up to the date of the despatch of the statement shall also accompany the statement to the Registrar. It was held in *Jagdish Behari* v. *Union of India*,[1] that in a situation where the general statement cannot possibly be prepared or made, that requirement having become impossible of performance, will be liable to be dispensed with. The Trade Union will nonetheless be liable to prepare the statement mentioned in section 28 (2) and the Registrar will be within his powers in receiving it and acting according to it.

It was held in *Indian Explosives Workers Union and another* v. *State of Bihar*,[2] that the Registrar of Trade Unions has jurisdiction to hold election of two rival Trade Unions and call upon the unions to furnish information for holding of elections.

It was held in *IFFCO Phulpur Karamchari Sangh* v. *Registrar of Trade Unions*[3] that the action of the Registrar of Trade Unions registering the change of names of office bearers of a union does not tantamount to registration of Trade Union.

Section 28 (3) provides that a copy of every alteration made in the rules of registered Trade Union shall be sent to the Registrar within fifteen days of the making of the alteration. On receiving a copy of an alteration made in the rules of a Trade Union, the Registrar, unless he has reason to believe that the alteration has not been made in the manner provided by the rules of the Trade Union, shall register the alteration in a register to be maintained for this purpose.[4] Section 6 (g) of this Act provides that the manner in which the rules shall be amended, varied or rescinded shall be provided by the rules of the Trade Union. Any alteration in rules of a Trade Union not made in conformity with the rules providing for such alteration will be invalid. A valid alteration of rules shall apply to all members including those in opposition of such changes. All valid alterations in the rules of a Trade Union shall be operative from the date they are made, whether action under section 28 (3) to send a copy of it to the Registrar has been taken or not.[5] The Registrar shall notify the fact of registration or the alteration to the Secretary of the Trade Union and until then amendment do not become effective.[6] The fee payable for registration of rules shall be rupee one for each set of alterations made simultaneously.[7]

Section 28 (4) of this Act provides that for the purpose of examining the documents referred to in sub-sections (1), (2) and (3), the Registrar, or any officer authorised by him, by general or special order, may at all reasonable times inspect the certificate of registration, account books, registers and other documents relating to a Trade Union. Any such person may either inspect at the registered office of the Trade Union or may require the production of any document at such place as he may specify in this behalf, but no such place shall be at a distance of more then ten miles from the registered office of a Trade Union.

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1. 1969 All. L.J. 1009.
2. (1992) 1 Lab. L.J. 578 (Pat.).
3. 1992) II. Lab. L.J. 239 (All.).
4. The Central Trade Union Regulations, 1938, R. 9.
5. *Osborn* v. *Amalgamated Society of Railway Servants*, (1909) 1 Ch. 176.
6. *Indian Oxygen Ltd.* v. *Their Workmen*, A.I.R. 1969 S.C. 306.
7. The Central Trade Union Regulations, 1938, R. 9 (2).

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CHAPTER IV
RECOGNITION OF TRADE UNION

The law relating to the recognition of Trade Unions in India was incorporated in Chapter III-A (from sections 28-A to 28-I) by an amendment of the Indian Trade Unions Act, 1926, in the year 1947. But these provisions have not been put into operation so far and have thus remained a dead letter on the statute book. Section 28-A deals with the definition of "the appropriate Government" Section 28-B makes provision for the appointment, constitution, powers and procedure of Labour Courts, Sections 28-C to 28-I deal with the law relating to recognition of Trade Unions.

Sec. 28-C. Recognition by Agreement.—(1) Where an employer agrees to recognize Trade Union, a memorandum of agreement by the employer and the officers of the Trade Union, or their authorised representatives may be presented to the Registrar who shall record the memorandum in a register in the prescribed manner.

(2) Such an agreement may be revoked by either party thereto on application made to the Registrar in the prescribed manner.

(3) While such an agreement is in force, the Trade Union shall, in its relations with the employer with whom the agreement is made, have all the rights of a recognized Trade Union under this Act, and shall for all other purposes be deemed to be a recognised Trade Union.

Sec. 28-D. Conditions for recognition by order of a Labour Court.—A Trade Union shall not be entitled to recognition by order of a Labour Court under section 28-E unless it fulfils the following conditions, namely—

(a) that all its ordinary members are workmen employed in the same industry or in industry closely allied to or connected with one another ;

(b) that it is representative of all the workmen employed by the employer in that industry or those industries ;

(c) that its rules do not provide for the exclusion from membership of any class of the workmen referred to in clause (b) ;

(d) that its rules provide for the procedure for declaring a strike ;

(e) that its rules provide that a meeting of its executive shall be held at least once in every six months ;

(f) that it is a registered Trade Union and that it has complied with all the provisions of this Act :

Provided that reference in clause (b) to "the employer" shall as respects recognition by an association of employers, be construed as a reference to all the employers who are members of the association.

In *All India Port and Dock Workers' Federation and others* v. *Union of India*,[1] the petitioner union represented third largest membership from amongst Unions. It was held that the Union of India is not justified in refusing to recognise the petitioner in the matter of negotiating the terms and conditions of service of the Port and Dock workers. Such refusal is against law and justice.

Sec. 28-E. Application to and grant of recognition by Labour Courts.—(1) Where a registered Trade Union having applied for recognition to an employer has

1. (1989) 2 Lab. L.J. 600 (Bombay).

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failed to obtain recognition within a period of three months from the date of making such application, it may apply in writing setting out such particulars as may be prescribed, to the Labour Court for recognition by that employer.

(2) A single application may be made under sub-section (1) for recognition :—

(a) by more than one employer, or

(b) by an association of employers as well as one or more members thereof.

(3) The Labour Court may call for further information, for the purpose of ascertaining whether the Trade Union is entitled to recognition by the employer under this section, and if the Trade Union fails to supply the required information within the time granted, the Labour Court may dismiss the application.

(4) The Labour Court shall, after serving notice in the prescribed manner on the employer, investigate whether the Trade Union fulfils the conditions for recognition set out in section 28-D, and in deciding whether the condition set out in clause (b) thereof is fulfilled, the Labour Court shall have regard to, but shall not be bound by the fact whether the proportion which the number of the workmen referred to in the said clause who are members of the Trade Union and are not in arrears of their subscription for any period exceeding three months bears to the total number of such workmen is less, or not less than such percentage, if any, as may be prescribed in this behalf either generally or in respect of any particular locality or any particular employer or class of employers or any particular industry or class of industries.

(5) If the Labour Court is satisfied that the Trade Union is fit to be recognized by the employer, it shall make an order directing such recognition and may, whether the recognition is to be by an association of employers, further direct, by the same or a subsequent order, recognition by every member of the association in relation to whom the Trade Union fulfils the condition set out in clause (b) of section 28-D.

(6) Every order made under sub-section (5) shall be forwarded to the appropriate Government which shall notify it in the Official Gazette, and while a recognition directed by such order is in force the Trade Union shall in its relation with the employer concerned, have all the rights of a recognized Trade Union under this Act and shall for all other purposes be deemed to be a recognized Trade Union.

Sec. 28-F. Rights of recognized Trade Unions.—(1) The executive of a recognized Trade Union shall be entitled to negotiate with employers in respect of matters connected with the employment or non-employment or the terms of employment or the conditions of labour of all or any of its members and the employer shall receive and send replies to letters sent by the executive and grant interviews to that body regarding such matters.

(2) Nothing in sub-section (1) shall be construed as requiring an employer to send replies to letters on or grant interviews regarding matters on which as a result of previous discussion with executive of the Trade Union, the employer has arrived at a conclusion, whether in agreement with executive or not unless a period of at least three months has elapsed since the said conclusion was intimated to the executive, or unless there has been a change in circumstances.

(3) Any dispute between the employer and the executive of a recognized Trade Union as to whether a conclusion has been arrived at, or whether there has been a change in circumstances within the meaning of sub-section (2) shall be referred to the Registrar whose decision shall be final.

(4) The executive of a recognized Trade Union shall be entitled to display notices of the Trade Union in any premises where its members are employed, and the employer shall afford the executive reasonable facilities for that purpose.

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Sec. 28-G. Withdrawal of recognition.—Where the recognition of a Trade Union has been directed under section 28-E, the Registrar or the employer may apply in writing to the Labour Court for withdrawal of the recognition on any of the following grounds, namely :

(a) that the executive or the members of the Trade Union have committed any unfair practice set out in section 28-J within three months prior to the date of the application ;

(b) that the Trade Union has failed to submit any return referred to in section 28-I ;

(c) that the Trade Union has ceased to be representative of the workmen referred to in clause (b) of section 28-D.

(2) On receipt of an application under sub-section (1) the Labour Court shall, unless it thinks fit to dismiss the application summarily, serve notice in the prescribed manner on the Trade Union to show cause why its recognition should not be withdrawn.

(3) If after giving a reasonable opportunity to the Trade Union to show cause the Labour Court is satisfied that the Trade Union is no longer fit to be recognized, it shall make an order declaring that the recognition of the Trade Union has been withdrawn, and forward a copy of the order to the appropriate Government which shall notify it in the official Gazette.

In *Tamil Nadu Elec. Board Union* v. *Tamil Nadu Elec. Board*,[1] the Electricity Board granted recognition to the petitioner Union. Later on the Union changed its name whereupon the Electricity Board withdrew the recognition. The question was whether withdrawal of recognition was valid. It was held that the composition of the union may be changed both in its name and the content because it does not change or enlarge its representative capacity. However, the representative capacity will be only in respect of ministerial staff, excluding peons, bill collectors and store-keepers because these categories of workers were not members of the union when recognition was granted. It was further held that a union cannot be prevented from changing its name. By enlarging its coverage so as to include all categories of employees who fall under the definition of "workmen" under section 2 (i) of Industrial Employment (Standing Orders) Act, 1946 neither in fact nor in law, did it want to enlarge the coverage relating to representative capacity or bargaining power.

In *Reserve Bank of India Employees' Association, Nagpur* v. *A.P. Aiyar Manager Reserve Bank of India, Nagpur and another*,[2] the Court was asked to determine whether refusal to grant recognition and derecognition stand on the same footing. It was held that refusal to grant recognition and withdrawal of recognition once granted cannot be placed on the same footing. Primary purpose of a Trade Union is collective bargaining and only recognised Unions can properly wield that authority and influence. Recognition once obtained by the Union becomes its soul and gives it a new vigour as an authorised bargaining agent of the members and indeed raises its status to a new height. Any Union can ill-afford to lose that status in case it wants to continue efficiently and effectively to serve the cause of the workers for which alone it is recognised. In any case, recognition gives certain privileges and "derecognition" amounts to their denial. Order of derecognition adds insult to the injury in case it is passed as a disciplinary measure and is for alleged commission of offence and/or acts of indiscipline. Such an order attaches stigma and is plainly punitive in nature.

It was held in *Workmen of Kampli Co-operative Sugar Factory Ltd.* v.

1. (1980) 2 L.L.J. 246 (Mad.).
2. (1984) 1 L.L.J. 156 (Bom.).

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Management of Kampli Co-operative Sugar Factory Ltd. and others[1] that where there is no provision in the statute regarding recognition, this right cannot be enforced by a writ petition. Where there is neither statutory provision nor an agreement between the employer and the union regarding recognition, no legal right is created simply because the union has been recognised by the management and when such recognition is withdrawn it does not violate any right.

In *T.N.E.B. Engineers' Sangam* v. *Tamil Nadu Electricity Board*,[2] the Tamil Nadu Electricity Board Engineers Sangam was accorded recognition by electricity board in a settlement. The Electricity Board did not implement the settlement. The Sangam agitated for implementation of settlement. The Electricity Board issued show cause notice as to why the recognition granted should not be withdrawn on the ground, that the members of Sangam staged a dharna and used disrespectful words against the officers of the Board. The Sangam in its reply denied the allegations and stated that they have neither indulged in any unfair labour practice nor have trespassed into the office of the chairman. The Board withdrew the recognition on the ground that they have violated the conditions of code of discipline. A writ petition was filed challenging the withdrawal of recognition. It was contended on behalf of the petitioners that the respondent has initiated disciplineary action against some of the members of Sangam and only when charges are proved in accordance with Standing Orders, it would be open to respondent to conclude the issues and withdraw the recognition. Agreeing with the above contention the High Court held that the respondent has not given any opportunity to put forth the grievances of petitioners by conducting an inquiry which will find whether the union has indulged in any unlawful activity. Therefore the withdrawal of recognition of the union without affording requisite opportunity to the petitioners is bad in law and is opposed to the principles of natural justice. Therefore, before the withdrawal of recognitions the employer must give opportunity to the union and must also state valid reasons for derecognition. Derecognition cannot be done in an arbitrary manner.

Sec. 28-H. Application for fresh recognition.—On the expiry of not less than six months from the date of withdrawal of recognition of a Trade Union under sub-section (3) of section 28-G, the Trade Union, if it continues to be a registered Trade Union, may again apply for recognition, and the procedure laid down in this Act shall apply in respect of such applications as if it were an original application for recognition.

Sec. 28-I. Recognized Trade Unions to submit prescribed returns.—Every Trade Union recognized under section 28-E shall submit to the Registrar at the prescribed time and in the prescribed manner such returns, in addition to those referred to in section 28, as may be prescribed.

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1. (1995) I Lab. L.J. 727 (Karn.).
2. (1996) 1 LLJ 1071 (Madras).

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CHAPTER V
REGULATIONS

Sec. 29. Power to make regulations.—Section 29 of the Trade Unions Act, 1926 provides that the appropriate Government may make regulations for the purpose of carrying into effect the provisions of this Act. These are the powers given in general terms to the appropriate Government. In particular the appropriate Government may by regulations provide for all or any of the following matters, namely :—

(a) the manner in which Trade Unions and the rules of the Trade Unions shall be registered and the fees payable on registration ;

(b) the transfer of registration in the case of any registered Trade Union which has changed its head office from one State to another ;

(c) the manner in which and the qualifications of the persons by whom the accounts of registered Trade Unions or any class of Unions shall be audited ;

(d) the conditions subject to which inspections of documents kept by Registrar shall be allowed and the fees which shall be chargeable in respect of such inspections ; and

(e) any matter which is to be or may be prescribed.

Sec. 30. Publication of Regulations.—All regulations mady by the appropriate Government in exercise of the power conferred by section 29 of the Act shall be published in the Official Gazette. They will be valid only after previous publication. The date to be specified in accordance with clause (3) of the General Clauses Act, 1897 as that after which a draft of regulations proposed to be made will be taken into consideration shall not be less than three months from the date on which the draft of the proposed regulation was published for general information. All regulations after publication in the Official Gazette shall have effect as if enacted in this Act.

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CHAPTER VI
PENALTIES AND PROCEDURE

Sections 31 to 33 of the Trade Unions Act deal with the penalties that can be imposed for default in submitting returns or for supply of false information or statements and also the procedure which is to be followed by the court while dealing with any such case.

Sec. 31. Failure to submit returns.—The following defaults are made punishable under section 31 of the Act, namely :

(i) failure to give *notice* which is required to be given by a registered Trade Union ;

(ii) failure to send *statements* which is required to be sent by a registered Trade Union ;

(iii) failure to send any *document* which is required to be sent by a registered Trade Union.

Every office bearer or other person bound by the rules of the Trade Union to give any information or send any statement or document as aforesaid shall in case of default be punishable with fine which may extend to five rupees. Where there is no office bearer or person as aforesaid, then, every member of the executive of the Trade Union in case of default to give information or send statement or document, shall be punishable with fine which may extend to five rupees. In case of continuing default an additional fine extending to five rupees for each week after the first during which the default continues, may be imposed. But in no case shall, aggregate fine exceed fifty rupees. The following information or statements are required to be submitted by a registered Trade Union :

(1) Notice of change in the address of head office of the Trade Union.

(2) Notice of change of name or amalgamation under section 25 of the Act.

(3) Notice of dissolution of the Trade Union.

(4) Returns as per section 28 of the Act.

Any person who wilfully makes or causes to be made any false entry in, or any omission from, the general statement, the copy of rules, or the copy of alteration of rules which are required to be submitted to the Registrar in case of a registered Trade Union by section 28 of the Act, shall be punishable with fine which may extend to five hundred rupees.

Sec. 32. Supplying false information regarding Trade Unions.—Section 32 provides that where any person with intent to deceive gives—

(a) to any member of a registered Trade Union, or

(b) to a person intending or applying to become a member of such Trade Union, any document purporting to be a copy of (i) any rules of the Trade Union, or (ii) any alterations of the rules, which he knows or has reason to believe that it is not a correct copy of rules or alterations of the rules as are for the time being in force, shall be punishable with fine which may extend to two hundred rupees. So also any person who with intent to deceive, gives a copy of any rules of an unregistered Trade Union to any person on the pretence that such rules are the rules of a registered Trade Union, shall be punished

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with fine which may extend to two hundred rupees.

Sec. 33. Cognizance of offences.—Section 33 of the Act provides that only a court of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act. Any other inferior court is expressly deprived of jurisdiction to try any offence under the Act.

No Court shall take cognizance of any offence under this Act, unless a complaint in respect thereof is made to it. The complaint may be, as provided by section 33 (2), made either by the Registrar of the Trade Unions or by some one else with the previous sanction of the Registrar. Where the offence complained of is one under section 32 of the Act, about supplying false copies of the rules or of the alterations to the rules, the complaint may be made by the person to whom the false copy was given. It is further provided that the complaint should be made within six months of the date on which the offence is alleged to have been committed.

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CHAPTER VII
COLLECTIVE BARGAINING AND TRADE DISPUTES

An individual is free to bargain for himself and safeguard his own interest. If an individual workman seeks employment he stands in a weaker position before his master, who having command over wealth stands in better position to dictate his own terms and the individual has to accept the offer without any reserves for he has to earn something to feed his family. However the position becomes different if a bargain is made by a body or association of workmen. They can negotiate and settle their terms with the employer in a better way and secure better wages, better terms of employment and greater security. The object of collective bargaining is to harmonise labour relations, promote industrial peace by creating equality of bargaining power between the labour and the capital. Collective bargaining can exist only in an atmosphere of political freedom. Any conditions of service like, wages, hours of work, leave, gratuity, bonus, allowances and other like privileges can all be settled by negotiation between the body of workmen and employer. Thus "collective bargaining" is that arrangement whereby the wages and conditions of employment of workmen are settled through a bargain between the employer and the workmen collectively whether represented through their Union or by some of them on behalf of all of them.

The Encyclopaedia of social sciences treats collective bargaining as a process of discussion and negotiation between two parties, one or both of whom is a group of persons acting in concert...more specifically it is the procedure by which an employer or employers and a group of employees agree upon the conditions of work. Ludwig Teller defines collective bargaining as an agreement between a single employer or an association of employers on the one hand and a labour Union on the other, which regulates the terms and conditions of employment.

"The Encyclopaedia Britannica", defines collective bargaining as "negotiation between an employer or group of employers and a group of work people to reach agreement on working conditions. If negotiations are between an employer and a group of his work people the dependence of the work people on the employer for their job weakens their bargaining power, and therefore collective bargaining is more usually understood to be negotiation between one or more Trade Unions and an employer or group or association of employers. Trade Union organisation gives the work people greater strength to providing means for the expert presentation of demands by skilled officials not dependent on the employers for their jobs. Further a Union has funds and means of obtaining information outside any one undertaking and can secure for the work people at any one firm the support of their fellows in other firms."

In the present day collective bargaining has become a general feature in all industry. Any agreement collectively arrived at is generally observed by both the employers and workmen who are not a party to it. Of course the Trade Union movement in India has not been able to reach that standard which its counterpart, in other developed countries could, yet it has done much. The object of any labour movement at all times is "to seek an ever rising standard of living, which means not only more money but more leisure and a richer cultural life."[1] Collective bargaining is not a means

1. Observations by George Meany-President of the American Federation of Labour in his article "What American Labour wants" published in "Readers Digest" of July 1955.

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of seeking a voice in management.[1] It is, no doubt, a method adopted by Trade Unions in championing the cause of their members.

Large concentration of economic power in the hands of the employer due to modern technological development has placed individual in a weaker position in so far as contractual bargaining relating to the terms and conditions of employment or settlement of disputes is concerned. It was to protect the interest of individual labour against the capitalist employer that the Trade Union movement gave birth to the principle of collective bargaining. The principle of collective bargaining presupposes the right of workmen to be represented collectively by a Trade Union. This right has received statutory recognition. A Trade Union can raise or sponsor a trade dispute and represent on behalf of its members in legal proceedings in consequence of an industrial dispute.[2] But a Trade Union cannot represent a workman who is not its member.[3] It does not mean that the workman himself cannot, where a Trade Union has right to represent his case, pursue or represent his own case in a legal proceeding. Provisions of section 36 of the Industrial Disputes Act, 1947 are only permissive. A workman can either himself represent his case or his case can be sponsored and represented by a Trade Union of which such workman is a member.

The rights of an unregistered Trade Union are different from a registered Trade Union. The employer can negotiate with an unregistered Trade Union. The management will be bound to recognize any Trade Union which has enrolled a majority of its employees as its member. A Union whether registered or unregistered commanding allegiance of a majority of the workmen has a better claim to negotiate with the employer on behalf of its workmen in preference to a registered Trade Union representing a minority of the workmen. To accept a principle other than this would, in the opinion of the Madras High Court, give room for abuse and lead to inconvenient results.[4]

But an unregistered Trade Union is not competent to represent its member's interest in proceedings initiated under the Industrial Disputes Act, 1947, because only an officer of a registered Trade Union is entitled to represent its member's interest in any proceeding under the Act. A worker who is a member of an unregistered Trade Union is entitled to be represented by an officer of a registered Trade Union connected with, or by any other workman employed in the industry in which such worker is employed, provided there is an authorisation to represent in prescribed manner.[5]

The process of collective agreements normally takes one or the other of the forms, namely, negotiation, mediation and arbitration, voluntary or compulsory.

Negotiation is the process of settling the differences by face to face round table talks between the representatives of the employees and employers. In case of failure of the negotiating machinery to resolve the difference by mutual discussions and understanding, a third party intervention to secure settlement of labour disputes by way of mediation is often resorted to. The mediator functions not as a judge, but assists the parties in dispute to reach an agreement by persuading them to resume or continue their bargaining efforts. Arbitration is an act of settling labour disputes through the medium of a neutral third party. The parties to a dispute may either agree amongst themselves to submit for settlement by a third person and abide by his award or a dispute might be submitted to arbitrator under the provisions of a statute. In the former case it is

1. Observations by George Meany-President of the American Federation of Labour in his article "What American Labour wants" published in "Readers Digest" of July 1955.
2. *Workers of B and C. Co.* v. *Labour Commissioner*, A.I.R. 1964 Mad. 538.
3. *Ibid.*
4. *Ibid.*
5. *Ram Kapil Singh* v. *Ali Husain*, A.I.R. 1964 Pat. 271.

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voluntary arbitration, in the latter it would be compulsory arbitration. In case of voluntary arbitration the selection of arbitrator entirely rests with the parties to the dispute. The award is binding on the parties and is also enforceable in the courts.

The Trade Unions in India could not contribute to the settlement of industrial disputes to the desired extent because the labour is divided and the employers are well organised. Further there is lack of proper labour leadership and the majority of workmen are illiterate and as such unable to participate in mutual discussions. There are a number of labour organisations, namely, All India Trade Union Congress, Indian National Trade Union Congress, Hind Mazdoor Sabha and the Trade Union Congress. These Unions take a stand different from the other on many issues because of their intra-union rivalry.

The rule of collective bargaining has been incorporated in the Industrial Disputes Act, 1947, wherein the provision is made for appointment of Conciliation Officers, charged with the duty of mediation in and promoting the settlement of industrial disputes. On a reference of a dispute to the Conciliation Officer, a Conciliation Board is constituted consisting of the representatives of employees and employer with the Conciliation Officer as its chairman. The memorandum of settlement duly signed by the parties is sent to the appropriate Government for publication. The main task of the Conciliation Officer is to go from one camp to the other and find out the greatest common measure of agreement....to investigate the dispute and do all such things as he thinks fit to arrive at a fair and amicable settlement of the dispute.[1] A settlement arrived at by agreement between the employer and workmen otherwise than in the course of conciliation proceedings shall be binding on the parties to the agreement. A settlement comes into operation on such date and is binding for such period as agreed upon by the parties. Dealing with the binding character of settlement Mr. Justice Chagla has observed that :—

> "Industrial law takes no notice of any private settlement or agreement arrived at between the parties in the course of an industrial dispute. Such a private agreement belongs to the realm of contract ; it may give rise to contractual rights ; it has no sanction in industrial law...an industrial dispute does not end until a settlement is arrived at which has been given a binding effect under the provision of section 19 (2) and such a settlement can only be arrived at when conciliation proceedings are held under section 12 of the Industrial Disputes Act, 1947."[2]

From these observations, it would be wrong to infer that a private settlement in respect of an industrial dispute does not end an industrial dispute. In this respect the following observations of Chief Justice Chagla are relevant :

> "But when parties do arrive at a settlement, the law gives to it a greater sanctity than it gives to an award and therefore, the industrial law does not contemplate any interference with finality of a settlement and it compels the settlement to run on for the period mentioned in the settlement itself and neither party is permitted to challenge that settlement during its duration,"[3]

The right of a Trade Union to speak legitimately on behalf of their members is recognised in Indian law but it does not in any way derogate an individual from his right to judge for himself, independently of any Trade Union, as to an offer advantageous to him, concerning his employment. The limits of the doctrine of collective bargaining inherent in the representative capacity of the Trade Unions *vis-a-vis* freedom of individual worker to protect his economic interest has been stated by Mr. Justice Anantanarayanan in *Tamilnadu Electricity Workers Federation* v. *Madras*

1. *Royal Calcutta Golf Club Mazdoor Union* v. *State of West Bengal*, A.I.R. 1956 Cal. 550.
2. *Poona Mazdoor Sabha* v. *G.K. Dhutia*, A.I.R. 1956 Bom. 743.
3. *Poona Mazdoor Sabha* v. *G.K. Dhutia*, A.I.R. 1956 Bom. 743.

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State Electricity Board,[1] in the following words :

"The whole theory of organised labour and its statutory recognition in Industrial legislation, is based upon the unequal bargaining power that prevails as between the capitalist employer and an individual workman, or disunited workmen. Collective bargaining is the foundation of the movement and it is in the interest of labour that statutory recognition has been accorded to Trade Union and their capacity to represent workmen, who are members of such bodies. But, of course there are limits to this doctrine, for otherwise, it may become a tyranny stifling the freedom of an individual worker. It is not then that every workman must necessarily be member of the Trade Union, and that, outside its fold, he cannot exercise any volition or choice in matter affecting his welfare. The representative powers of organisation of labour, with regard to enactments, such as the Industrial Disputes Act, will have to be interpreted in the light of the individual freedom guaranteed in the Constitution, and not as though such freedom did not independently exist, as far as organised labour is concerned."

The Unions and the employers, while making a collective bargaining must be sufficiently watchful that the agreement arrived at should be in conformity not only with the provisions of a general law touching upon the subject of dispute, but also be in conformity with the provisions of the industrial law having a bearing with the subject matter of dispute. It has also to be borne in mind while making an agreement that the interest of the workers who are not the members of the Trade Union are also protected and the workers are not discriminated against.[2]

The principle of collective bargaining has been recognised by the International Labour Organisation also. The Industrial Labour Conference held in 1951 adopted a resolution recommending collective agreements which provided that :—

(i) Machinery appropriate to the conditions existing in each industry should be established by means of agreements or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and review collective agreements, or to be available to assist the parties in the negotiations, conclusions, revision, and renewal of collective agreements.

(ii) The organisation, methods of operation and function of such machinery should be determined by agreements between the parties or by national laws, or regulations as may be appropriate under national conditions.

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1. A.I.R. 1956 Mad. 111.
2. *Mst. Deoli Bakaram* v. *The State Industrial Court, Nagpur*, A.I.R. 1959 Bom. 70.

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THE WORKMEN'S COMPENSATION ACT, 1923

CHAPTER I
PRELIMINARY

Introduction.—In any industrial society the problem of labour management relations becomes so important that some sort of social insurance becomes necessary to provide adequate protention from losses caused to the labourers by accidents. With a view to improve the condition of the workmen some social insurance legislations have been enacted. The Workmen's Compensation Act, is one of the earliest measures adopted to benefit the labourers. It was passed in 1923 and enforced on Ist July, 1924. Since then a number of amendments have been made from time to time so as to suit the changing needs and conditions of the workmen.

The object of the Act was to make provision for the payment of compensation by certain class of employers to their workmen for injury by accident. The reasons that compelled the initiation of the Bill were attributed to the growing complexity of industry with the increasing use of machinery and consequent danger to workmen along with the comparative poverty of workmen themselves that rendered it advisable that they should be protected as far as possible from hardhips arising from accidents.

It was as early as 1884, that the question of payment of compensation to workmen involved in serious or fatal accidents was raised, when the Factory and Mining Inspectors drew the attention of the Government to this human problem which warranted immediate legislative protection of workmen. But its importance was realised by the Government of India only at the end of 1920, when public opinion was invited on connected issues. A committee consisting of members of the Legislative Assembly, employers, workers or representatives of workers, medical and insurance experts was constituted. It was on the basis of the recommendation of the committee that Workmen's Compensation Act was enacted in 1923 which provided for setting up of Tribunals on the American model to decide disputes, appointment of special Commissioners with wide powers and a limited right of appeal to the High Court.

Originally the Act was applicable to workers of certain specified industries, employed otherwise than in clerical capacity ; and receiving monthly wages not exceeding Rs. 300. The workmen (as defined in the Act) were entitled to compensation from the employer in case of personal injury caused by accident arising out of and in the course of emplyment with certain reservations to the duration of incapacity and negligence of workman himself. The payment of compensation was mainly dependent upon the incapacity or disablement of workmen. Any claim for compensation was to be determined in accordance with the provisions of the Act and rules made thereunder by Provincial Commissioners for workmen's compensation.

With the progress of time and change in the standards of living in the society the Act has on many occasions been modified so as to benfit greater number of workmen and to provide for payment of greater amount of compensation to them. The Royel Commission on labour paid a tribute to the smooth working of the Act and

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recommended the extension of the benefits under the Act to a larger class of employees. But Prof. B.P. Adarkar in his report on Health Insurance for Industrial Workers was of the opinion that the Workmen's Compensation Act has become out of date in its scope and operation and that the administration and operation of the Act have been a comparative failure. Prof. Adarkar advocated for compulsory insurance of all workmen. The result was that the Employees' State Insurance Act, 1948, was passed. This Act was a substantial improvement over the Workmen's Compensation Act. Any person who is covered by the Employees' State Insurance Act, 1948 and who is entitled to receive disablement or dependant's benefit under this Act is not entitled to compensation from the employer under the Workmen's Compensation Act, 1923. The scope of the Employees' State Insurance Act is limited but it is hoped that in times to come it will cover the entire field of compensation by replacing the Workmen's Compensation Act. What is actually intended to be insured by such Acts is the rehabilitation of the workman himself or of his dependants. For the progress of democratic socialism and its needed impact on the society the socialisation of the needs and miseries of man is as important as the socialisation of the basis of production and wealth.

The Workmen's Compensation Act was framed with a view to provide for compensation to workmen incapacitated by an injury from accident arising out of and in the course of employment. It is a guarantee against hazards of employment to which a workman is exposed because of his employment. The main object of the Act was to make provision for payment of compensation to a workman only, (*i.e*, the concerned employee himself in case of his suviving the injury in question and to his dependants in the case of his death) in view of section 2 (1) (n) of the Act.[1] But compensation is not the only benefit flowing from this Act ; it has important effects in furthering work on the prevention of accidents, in giving workmen greater freedom from anxiety and in rendering industry more attractive.[2]

This Act extends to the whole of India except the State of Jammu and Kashmir. Unlike the English Act, this Act is not applicable to all workmen. It is applicable to workmen of certain industries. It affords protection to a workman from loss or injury caused by *accident arisng out of and in the course of* his emplyment. It is not neccessary that the accident should have been caused by some wrongful act of the employer. Compensation is payable only when the conditions provided by section 3 are fulfilled and the procedure prescribed by section 10 has been adopted in making a claim to compensation. Any claim for compensation must be made within two years of the occurrence of the accident or in case of death within two years from the date of death.

The rights and liabilities of the parties stand crystallised on the date of the accident under sections 3 and 4 of the Act. Where the Schedule is amended it must have a prospective operation unless the Schedule is made expressly retrospective. Therefore, compensation would be payable at rates applicable on the date of the accident.[3]

Main Features of the Act

1. The Workmen's Compensation Act is modelled on the British pattern. Under the Act payment of compensation has been made obligatory on all employers whose employees are entitled to claim benefit under the Act.

2. The workman or his dependants may claim compensation if the injury has been caused by accident arising out of and in the course of employment and in case of injury not resulting in death if such accident cannot be atttributed to the workman having been at the time of accident under the influence of drink or drugs or if it is not

1. *In re*, B. Habeebullah Periaswami, A.I.R. 1977 Mad. 330
2. Report of the Royal Commission on Labour in India. p. 298.
3. *Madan Mohan Verma v. Mohan Lal*, (1922) 2 L.L.J. 322 (All)

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cuased due to wilful disobedience of rule or orders or disregard of safety devices.

3. The various classes of workmen have been specified in the definition of "Workman" in section 2 (1)(n) and in Schedule II. Persons employed in administrative or clerical capacity and earning more than Rs. 1,600/- per month (except railway servants) were excluded from the benfit of the Act. But now the condition of average monthly wage limit of Rs. 1,600/- has been abolished.

4. The amount of compensation payable depends in case of death on the average monthly wages of the deceased workman and in the case of an injured workman both on the average monthly wages and the nature of disablement.

5. The term "wages" for the purposes of this Act includes over-time pay, and the value of any concessions or benefit in the form of food, clothing, free quarters, etc. Whenever the compensation payable to any workman has to be worked out, first of all his monthly wages are determined and then the amount of compensation is decided by reference to section 4 and Schedule IV, where in the method for determining the amount of compensation for death, and permanent disablement is given.

6. In order to protect the interest of dependants in case of fatal accidents the following provisions are made—

(i) All cases of fatal accident are to be brought to the notice of the Commissioner ;

(ii) If the employer admits his liability the amount of compensation payable is to be deposited with the Commissioner ;

(iii) If the employer admits his liability and at the same time there are grounds for believing compensation to be payable, the dependants get the information necessary to enable them to judge if they should make a claim or not.

7. A sub-contractor may indemnify his contractor if he has had to pay compensation either to a principal or to a workman.

8. The Commissioner may deduct a sum of Rs. 50/- from the amount of compensation and pay the same to the person who has incurred funeral expenses of the deceased workman.

9. The Act is administered by the Commissioner for Workman's Compensation appointed by the State Government.

Principles Governing Compensation.—The purpose of the Workmen's Compensation Act is not to provide for solatium to the workman or his dependants but to make good the actual losses suffered by him.[1] Compensation is in the nature of insurance of the workman against certain risk of accident. The rule, that in order to make the employer liable to pay compensation, death or injury must be the consequence of an accident arising out of and in the course of his employment, is dependent upon the following four conditions :

(1) A causal connection between the injury and the accident, and the accident and the work done in the course of employment is essential.

(2) The onus lies upon the claimant to establish that the injury or its aggravation was the outcome of the work and resulting strain.

(3) It is not necessary that the workman must be actually working at the time of his death or that death must occur while he is working or has just ceased to work.

(4) If the evidence adduced shows greater probability which satisfies a reasonable man that the work contributed to the causing of personal injury, it would be sufficient ground for the workman to succeed in his claim.[2]

1. *Daniel v. Maung Hla Seen*, A.I.R. 1939 Rangoon 360.
2. *Bai Shakri v. New Maneck Mills Co.*, A.I.R. 1961 Guj. 34.

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Nature of Liability.—The Workmen's Compensation Act creates a new type of liability. It is not strictly a liability arising out of tort, but is a sort of liability arising out of the relationship of the employer and the employee. An employer under this Act is liable to pay compensation at a rate fixed in the Act itself to any workman incapacitated by an accident arising out of and in the course of his employment. The main principle governing the compensation is not dependent on the suffering caused to the workman or expenses incurred by him in his treatment but on the difference between his wage earning capacity before and after the accident. The liability for the payment of compensation is not dependent upon the neglect or wrongful act on the part of the employer.

Doctrine of added peril.—The principle of added peril means that if a workman while doing his employer's work, trade or business engages himself in some other work which he is not ordinarily required to do under the contract of his employment and which act involves extra danger, he cannot hold his master liable for the risk arising therefrom. The doctrine of added peril, therefore, comes into play only when the workman is at the time of meeting the accident performing his duty.[1]

Adjudication of Compensation.—Compensation may be fixed either by settlement or by award. Once the compensation has been fixed, it cannot be revised on the ground of subsequent aggravation of a permanent disability. Compensation, once fixed operates for ever except in cases covered by section 6 of the Act, which provides for making subsequent change in the amount of compensation on the ground of change in circumstances. But the scope of section 6 is limited only to half monthly payments which are prescribed by the Act for only temporary disablement. No review on the ground of aggravation of disability is maintainable even under sections 17, 19 and 22 of this Act.[2]

Self-inflicted Injury.—An injury caused by accident which could have been anticipated or foreseen, or is brought about intentionally or negligently by the workman himself does not make the master liable, for it cannot be termed as an injury by accident within the terms of the Act. Accident means any unintended and unexpected occurrence, which produces hurt or loss. If the mishap was designed, intended or anticipated it is self-inflicted injury and not an injury caused by accident.

Contributory Negligence.—Contributory negligence is not ground under the Act for reducing the amount of compensation if the accident has arisen in the course of employment. A workman, an employee in a saw mill, received injuries on his finger, was given treatment by the employer and re-employed. Later on the injury developed into tetanus and the workman died due to negligence. It was held that compensation payable to the widow cannot be reduced on the ground of contributory negligence.[3]

Definitions

Interpretation—Section 2(1) of the Workmen's Compensation Act begins with the words "in this Act unless there is anything repugnant in the subject or context". Repugnant means something inconsistent with or contrary to any thing said before in the Act itself. If two provisions of the same statute are contrary to one another, the test of repugnancy is to see whether the two can co-exist.[4] If both of such contradictory provisions can stand together they are not repugnant. If one of such provisions says "do" and another in relation to the same subject-matter says "do not" they are said to be repugnant with each other.

1. *Bhurangya Coal Co.* v. *Sahebjan,* A.I.R. 1956, Pat. 299.
2. *Angus Co. Ltd.* v. *Chouthi,* A.I.R. 1955 Cal. 616.
3. *P.C. Abdulla Kutty* v. *C. Janaki,* A.I.R. 1953 Mad. 837.
4. *Bir Vikram Kishore Manikya Bahadur* v. *Tafazzal Hussain,* A.I.R. 1942 Cal. 587.

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Commissioner.—Section 2(1)(b) says that "Commissioner" means a Commissioner for Workmen's Compensation appointed under section 20 of the Act. There is difference of opinion amongst the High Courts whether Commissioner is a Civil Court or not. According to Patna High Court Commissioner is Civil Court subordinate to the High Court.[1] But according to the latest decision of Madhya Pradesh High Court in *Yashwant Rao* v. *Sampat* [2] Commissioner is a tribunal and not a Civil Court. It is true that an appeal lies to the High Court against certain orders of the Commissioner under section 30 of the Act ; yet having regard to the provisions of sections 3(5) and 19(2) of the Act, it cannot be said that the Commissioner is a Civil Court or a Court in the technical sense. Therefore, an order passed by him deciding a dispute under section 19(2) of the Act is not revisable by the High Court under section 115 of the C.P. Code," Section 30 of the Act gives right to appeal to the High Court from the order of the Commissioner for a limited purpose only.

Compensation.—Section 2(1)(c) says that "compensation" means compensation as provided for by this Act. Compensation under this Act is not the same thing as damages in Torts. The principles on which liability to pay compensation and damages in Torts is based are different. The defence of '*valenti non fit injuria*' though available in any proceeding in Torts is not available in any proceeding under this Act. Similarly, the defence of contributory negligence, inevitable accident or negligence of co-worker are not available in a proceeding for compensation. Once the compensation is determined by the Commissioner on the basis of a medical certificate issued by a qualified medical practitioner, it cannot subsequently be upset on the ground that another doctor had after one and half years found some improvement in the injured organ of the workman.[3]

Dependant.—Section 2(1)(d) of the Act defines dependant. Under this sub-section relations of a workman are divided into three classes. However, there is no preferential right amongst dependants to maintain claim application. The dependants are not classified in different categories in the sense that those specified in category I will exclude others.[4] Dependants belonging to any category may claim simultaneously.

(i) The first category includes a window, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter and a widowed mother. They are deemed in law as dependants of a workman whether they are in fact dependant on the earnings of the workman or not.

(ii) In the second category of dependants are included a son and a daughter, they have to fulfil the following conditions, namely :

(a) They must be wholly dependant on the earnings of the workman at the time of his death ;

(b) They must be infirm ; and

(c) They must have attained the age of 18 years.

(iii) The following are included in the third category of dependants provided they are wholly or in part dependant on the earnings of the workman at the time of his death :

(a) a widower,

(b) a parent other than a widowed mother,

(c) (i) a minor illegitimate son,

1. *Dirji* v. *Goalin*, A.I.R. 1942, Pat. 33.
2. AIR 1979 MP 21.
3. *Bharat Heavy Plate and Vessels Limited* v. *Commissioner for W.C.* (1953) I.L.L.J. 477 (Allahabad).
4. *New India Insurance Co. Ltd.* v. *Man Singh and others* (1984) I.L.L.J. 186 (M.P.).

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(ii) an unmarried illegitimate daughter,

(iii) a daughter whether legitimate or illegitimate or adopted if married and minor, or if widowed and a minor,

(d) a minor brother or an unmarried sister or a widowed sister if a minor,

(e) a widowed daughter-in-law,

(f) a minor child of a predeceased son,

(g) a minor child of a predeceased daughter where no parent of the child is alive, or

(h) a paternal grandparent if no parent of workman is alive.

Explanation.—For the purposes of sub-clause (ii) and items (f) and (g) of sub-clause (iii), references to a son, daughter or child include an adopted son, daughter or child respectively.

Question of Dependency.—Dependency is a question of fact. Therefore, where a person claims compensation as a dependant of the deceased workman, he must establish that he is a dependant within the meaning of section 2(1)(d) of the Act. In all those cases the question of payment of compensation is conditioned by such claimant being wholly or in part dependant upon the earnings of the workman, it is not necessary for the dependants to obtain written letters of administration or a succession certificate. Dependant does not include all the heirs of a workman but only those who, to some extent, depend upon him. Kinship coupled with dependency is made the sole criterion for a person to fall within the ambit of the definition of dependant.[1]

(i) Widiow.—A window who is entitled to claim compensation at the time of death of her husband is not disentitled by her subsequent remarriage.[2] The Act takes into consideration only those situations and facts that are in existence at the time of death of a workman. Subsequent events do not affect the right of a dependant under the Act. Section 8(5) of the Act also supports the above view.[3] The question of chastity or unchastity is not allowed to be raised to defeat any claim of the widow to compensation under the Act.

(ii) Minor Legitimate Son.—A 'posthumous son' is treated like a 'minor legitimate son'. Probably, there is no Indian case law on this point, but the view is supported by Halsbury's Laws of England.[4] Son includes an adopted son also provided the adoption is valid under personal law applicable to the dependant.[5]

(iii) Unmarried Legitimate Daughter.—The expression 'unmarried daughter' includes a widowed daughter, who is being maintained by her father during his life time.[6] A daughter undoubtedly acquires a new relationship on marriage but she does not lose the old relationship ; she remains a daughter. Once a daughter always a daughter *qua* relationship she is daughter before, during and after marriage. The next question is : does "unmarried daughter" include an 'adopted daughter' also. Under the Hindu Adoption and Maintenance Act, 1956 adoption of daughter is permissible. Therefore, an adopted unmarried daughter would be included in "unmarried daughter". Unmarried daughter does not include a daughter who has been divorced.[7]

(iv) Mother.—A mother if widow is covered by section 2(1)(d), sub-clause (i), and if not a widow under sub-clause (iii)(b) of the same section under the expression 'parent other than a widowed mother.' In the opinion of Madhya Pradesh High Court

1. *B.M. Habeebullah* v. *Periaswami,* A.I.R. 1977 Mad. 390.
2. *R.B. Moondra and Co.* v. *Mst Bhanwari,* A.I.R. 1970 Raj. 111.
3. *Ravuri Kotayya* v. *Dassari Nagavera Dhanamma,* A.I.R. 1962 A.P. 42.
4. Vol. 34. p. 892.
5. *In re* Devi Dutta, A.I.R. 1931 Lah. 661.
6. *Soleman Bibi* v. *East India Railway,* AIR 1933 Cal 358.
7. *Rajbanga* v. *Bihari Bux,* 1969 All LJ 15.

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mother would be entitled to compensation under the latter sub-clause even if she had remarried ; provided that she can prove that she was wholly or in part dependent upon the earnings of the workman[1]. But this is no more a valid law in view of amendment of the Act by Act VIII of 1959. Now remarriage operates as a bar to any claim to compensation under the Act. A 'widowed step mother' is not covered by the expression 'widowed mother.'[2] and is therefore not entitled to claim compensation under the Act. Nagpur High Court is of the opinion that the phrasc 'widowed mother' would include an 'adoptive widowed mother,' for the purpose of section 2(1)(d)(i) of this Act.[3]

Father.—Father can claim compensation under section 2(1)(d)(iii)(b) of the Act, provided that he can show that he was wholly or in part dependent upon the earnings of his son at the time of his death.[4] It is a question of fact that under a given circumstance parents can be said to be dependent upon the earnings of their children. In *Main Colliery Co.* v. *Davies,*[5] the deceased was a minor aged 16 years earning 8 sh. a week. He lived with his parents and gave them all his earnings. Parents managed for the fooding, lodging and clothing of the boy and gave him a little pocket money. Father was a collier earning 25 sh. a week. It was held that father was partially dependent upon the earnings of his deceased son. It was observed that :

> "The burden to maintain the family is upon the father. He discharges his obligation from a general family fund. He obtains a partial contribution to the general family fund from the wages of those who are maintained by him. It, therefore, appears that he must be relying or dependent for the means by which he discharges his legal obligations, upon the funds supplied to him, or partly supplied to him by the children who earn those funds."

These observations can very well be applicable to a joint Hindu family in our country. In *St Joseph's Automobile* v. *Maria Soosai,*[6] it has been held that : "when the earnings of the deceased workman were hardly sufficient for his maintenance and no balance was left which would contribute to the family fund the parents cannot be said to be dependent." but this view appears to have been modified in *Ponnuswamy Gounder* v. *Rangaswamy,*[7] wherein it was held that :

> "It is extremely difficult to lay down any hard and fast rule about what is sufficient for the maintenance of an individual person, and to work out an excess out of earnings available for the father and mother and the other members of his family to enjoy. In cases of poor working families particularly those living jointly all the earnings come into the common pool and it may often happen that the common pool is actually quite insufficient to maintain the members at a bare standard of existence."

Therefore, even if the earnings of a deceased workman were hardly sufficient for his own maintenance, leaving no balance for contribution to the family fund, the parents can still be dependent upon his earnings.

Parents.—In *Ramji and another* v. *Lalit Kumar Bardiya and others,*[8] Shatrughna was driver of a tractor. Shatrughna was crushed under the tractor in an accident arising out of and in the course of employment and died. His parents, the present appellant claimed compensation which was rejected by the Commissioner on the ground that the

1. *Intiabji* v. *M.C. Colliery,* A.I.R. 1959 M.P. 329.
2. *Manada Debi* v. *Bengal Bone Mills,* A.I.R. 1940 Cal. 285.
3. *Additional Deputy Commissioner, Singbhum* v. *Smt. Laxmibai Naidu.,* A.I.R. 1945 Nagpur 238.
4. *Kunnesin* v. *Navia,* A.I.R. 1966 Raj. 36.
5. 1900 A.C. 358.
6. A.I.R. 1953 Mad. 206.
7. A.I.R. 1953 Mad. 766.
8. (1995) A.C.J. 910 (MP).

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deceased workman was never paid any salary by the employer and he having received support from his parents, the parents cannot claim as dependant. The deceased lived jointly with his parents and other members of the family who were daily wage-earners.

It was held that in Indian joint families, there is sharing of income and responsibilities. Inter-dependence and mutual co-operation alone makes living in joint families possible. Therefore parents who have not been receiving money from deceased on account of non-payment of such amount from his employer but in natural and normal course would have received such benefit from the earnings of the deceased are included in the definition of dependant.

(vi) Minor Brother.—A minor brother is a dependant under section 2(1)(d)(iii), sub-clause (d). It includes consanguine brother or uterine brother.[1] A consanguine brother is one where father is the same but the mother is different. A uterine brother is one from the same mother but from a different father. Madhya Pradesh High Court treat both consanguine and uterine brothers, on equal footing because both are half blood brothers, commonly known as step-brothers. Rangoon High Court has expressed a contrary opinion and does not treat half blood brothers as brother.[2]

The general principle on which section 127 of the Indian Succession Act, 1925, is based does not make a distinction between the brothers of full blood and half blood. According to the present law, the two brothers, *i.e.* full blood and half blood stand on the same footing.

Employer.—In view of section 2(1)(e) employer includes the following :

(1) any body of persons whether incorporated or not,
(2) any managing agent of an employer,
(3) legal representative of a deceased employer, and
(4) when the services of a workman are temporarily lent on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him.

Till 1948, the liability to pay compensation under the Act was only that of the person with whom the workman has entered into a contract of service or apprenticeship. But later on the Act was amended so as to cover cases under section 12 of the Act which makes the borrowing employer also liable. If a person is employed for the purposes of any game or recreation and engaged or paid through a club, the manager or the members of the managing committee of the club will, for the purpose of the Act. be deemed to be the employer.

In *Baijnath Singh* v. *O.T. Railway*,[3] dependants of a workman, who died from an accident resulting from collision of a light engine with a trolly which he was plying, made General Manager O.T., Railway a party to their claim. The Allahabad High Court held that "the 'manager' of a railway is according to the definition of railway administration in section 3(6) of the Railway Act, equated to the Government...he, therefore, satisfied the definition of managing agent in the Workmen's Compensation Act, because he can be said to be running the department which he is directly concerned with."

In *Municipal Board, Almora* v. *Jasod Singh*,[4] the State was executing the electrification scheme of a town on behalf of the Municipal Board and during the construction an employee of the State engaged in such construction suffered permanent

1. *In re* Dependants of Kartar Singh, A.I.R. 1933 Lah. 752.
2. *In re* Maung Kyn., A.I.R. 1931 Rang. 1731.
3. A.I.R. 1960 All. 362.
4. A.I.R. 1960 All. 468.

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partial injury. It was held that the State was liable to pay compensation. In this case it was immaterial whether the State was working for itself or for Municipal Board. The Board, therefore, is not liable, under section 12 of the Act if it entrusts the construction to the Government because it is not ordinary trade or business of Municipal Board to execute electrical projects.

The Calcutta High Court has also expressed a similar opinion in *Karnani Industrial Bank Ltd.* v. *Ranjan*[1] where the bank had entusted construction of a building to a contractor and a workman was injured in the course of this work. The Court held that it was not within the ordinary trade or business of the bank to build houses and, therefore, the bank was not liable to pay compensation under the Act. It is payable by the employer. It cannot he awarded against insurance company unless the case falls within section 14 of the Act.[2]

A person can be held to be employer of another if there is a contract of employment between the two. It should be direct and immediate and not indirect and remote. Thus, where a batch of coolies is hired by an agricultural society to stock and remove the goods from the goodown and the society pays them their charges directly, although these charges are later recovered from the members of the society, but the members have no control over them and are not responsible to them for their payment. It cannot be said that the relationship of employer and employee is established between the two *i.e.*, the members and the coolies simply because charges are recovered from the members. Society would alone be employer of the coolies and, hence, it is the Society and not the members who are responsible for payment of compensation.[3]

In *Bai Mani* v. *Executive Engineer, Irrigation Project Division, Baroda*,[4] the appellants were the dependants of deceased Mabendrabhai Rathva working in Irrigation Project. He was paid daily wages for excavation work. Excavation and construction work was undertaken by Public Works Department of State of Gujarat and the deceased employee was engaged by the contractor. The trial judge had held that the deceased was the employee of the contractor and that the Executive Engineer and the State Government were not liable to pay compensation and penalty. But the High Court of Gujarat held that the word 'trade' means commercial activity but a 'business' has much wide connotation and covers activity which may not be commercial and may include the construction work carried out by public works department. The legislature has advisedly used the term trade and business to cover not only commercial activity but also many other activites which would be covered under the term 'business'. Hence the Executive Engineer of the State of Gujarat and the contractor are jointly and severally liable to pay compensation.

Lending or letting on hire.—Where the services of a workman is let on hire to some person and he is under the orders and control of such other person, the person to whom the services are being actually rendered shall be in law the employer of the workman and would be liable to pay compensation.[5] Where the workman works upon another's premises, the principal employer is liable only when such workman works under his orders and control, and provided further that it is the ordinary trade or business of the principal to do such work.

Liability of the legal representative.—After the death of employer, the liability of his legal representative is limited to the extent of the estate of the deceased at his

1. A.I.R. 1968 Cal. 63.
2. *R.B. Moondra and Co.* v. *Mst. Bhanwari*, A.I.R. 1970 Raj. 111.
3. *Dhulia Taluka Sahakari Kharidi Vikri and Prakriya Society and others* v. *Savitraken and others* (1985) 2 L.L.J. 99 (Bom).
4. (1986) 2 L.L.J 426 (Guj.)
5. *C.H. Bull and Co.* v. *West African Shipping*, (1927) A.C. 686.

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hand. He is not absolutely liable.

Contract of service and contract for service.—To establish the relationship of employer and employee a contract of service is usually necessary, whether the contract be express or implied. There is difference between a 'contract of service' and a 'contract for service'. It is the former and not the latter which is essential for employer-employee retationship.

(i) In case of a 'contract for service' the master can only order or require a person what is to be done; but in the case of 'contract of service' he can order or require not only what is to be done but also how that shall be done.

(ii) A 'contract of service' imports an obligation on the employee to obey the orders of the person served[1] but a 'contract for service' does not import an obligation to obey each and every order given by the employer.

(ii) In case of 'contract of service' the agreement is for personal labour of the person engaged; a 'contract for service' does not necessarily mean an agreement for personal labour but to get the desired work done.

The Workmen's Compensation Act deals only with those cases where there is a contract of service and not a contract for service. In *Indar Singh* v. *Secretary of State*[2] the student of an Engineering College got some remuneration for doing labour in the workshop of their college. It was held that the wages in case of such students do not import a contract of service as ordinarily understood between the students and the college. The term wages involves the notion of a contract of service or employment and the manual labour that a man does must be solely for the benefit of his employer. The labour done in workshop by students is primarily, if not entirely, directed to the imparting of instruction for the benefit of students.

Managing agent.—The definition of "Managing Agent" as given in section 2(1)(f) is very vague. It consists of two parts. The first part says that any person appointed or acting as the representative of another for the purpose of carrying on such other person's trade or business is Managing Agent. Evidently it is not necessary that a managing agent should be appointed by the employer but merely acting as a representative will be sufficient to constitute a Managing Agent. No written authority is necessary to constitute the managing agency. The latter part of the definition is restrictive and excludes an individual manager subordinate to an employer. Thus, the two parts of section 2(1)(f) do not clearly define Managing Agent. The latter part is in the nature of a proviso and, therefore, it has to be interpreted strictly. There are two modes of constituting Managing Agents, one is by appointment and the other is one acting as representative of another.[3]

Now the question is who can be a Managing Agent not subordinate to an employer ? "Employer" as defined in section 2(1)(e) of the Act includes any body of persons whether incorporated or not and any managing agent of an employer. An employer may be one individual or more tht one. If there are two or more persons, then it will be open to them to appoint one of them as a managing agent. A managing agent so appointed will not be subordinate to the employer and his position will substantially be akin to that of a managing agent as defined in section 1(25) of the Indian Companies Act. It may be that an employer is a minor or insane or under some disability. In that case a guardian or any other person acting as the representative of the employer for the purpose of carrying on such employer's trade or business will be a managing agent not subordinate to that employer. Subordinate means subordinate in law, not in fact.[4]

Minor—According to section 2(1)(ff) any person who has not attained the age of

1. *Surmans* v. *Health Laundary Co.* (1910) A.C. 43.
2. A.I.R. 1929 Lah. 573.
3. *Raghunath Sahai* v. *Sarup Singh*, (1962) 1 L.L.J. 19 (All).
4. Ibid.

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18 years is a minor. By the Amendment of 1959 the distinction between minor and adult was done away with for the purposes of this Act only. Before this amendment different rates of compensation were provided for adult and minor in case of death or permanent disablement on the ground that a minor had no dependants. Since there was not much justification for this distinction the Act was amended accordingly to provide for uniform rate of compensation.

Partial Disablement.—Section 2(1)(g) defines partial disablement. Such disablement is of two kinds—

(i) Temporary partial disablement.
(ii) Permanent partial disablement.

The test of such disablement is the reduction in the earning capacity of the workman. If the earning capacity of a workman is reduced in relation to the employment he had been at the time of the accident resulting in such disablement, it is temporary partial disablement. If the injury caused by an accient results in the reduction of the earning capacity in respect of employment which the workman was capable of undertaking at the time of accident it is permanent partial disablement. Any injury specified in part II of Schedule I shall be deemed to result in permanent partial disablement. Compensation under the Act is payable only if the injury caused by an accident results in workman's disablement exceeding three days.

To determine whether the injury is permanent or temporay the courts have to see whether the injury has incapacitated the workman from every employment which he was capable of undertaking at the time of accident or merely from the particular employment in which he was at the time of the accident resulting in disablement. In the former case the disablement is partial but permanent, in the latter case it is temporary.

Loss of earning capacity or the extent of it is question of fact. It has to be determined by taking into account the diminution or destruction of physical capacity as disclosed by the medical evidence and then it is to be seen to what extent such diminution or destruction would reasonably be taken to have disabled the affected workman from performing the duties which a workman of his class ordinarily performs.[1]

The following propositions are helpful in deciding the nature of disablement :[2]

(i) Earning is not the same as earning capacity. There is difference between earning of a person and his capacity to earn.
(ii) Rise in earning may be because of various factors and rise in wages is not decisive of no loss of earning capacity.
(iii) Loss of physical capacity is not co-extensive with loss of earning capacity.
(iv) Loss of physical capacity or physical incapacity may be relevant in assessing to what extent there is loss of earning capacity for every employment which the workman was capable of undertaking at that time or the employment in which he was engaged at the time of the accident as the case falls for consideration.

In *Upper Doaba Sugar Mills Ltd.* v. *Daulat Ram*[3] a blacksmith had lost the index and midle finger, the rest of the hand, namely, thumb and other two fingers could be utilized in work. The test laid down in this case to determine the nature of disablement was that : "It is not enough if it is found that the workman is disabled from performing his duties of a blacksmith fitter ; the Court should consider whether he has been incapacitated from undertaking any employment and whether in that other employment

1. *Calcutta Licensed Measures Bengal Chamber of Commerce* v. *Md. Hossian*, A.I.R. 1969 Cal. 378.
2. *Ibid.*
3. A.I.R. 1960 All. 193

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the rest of the hand could be utilised.

In *General Manager G.R.P. Railway, Bombay* v. *Shankar*,[1] a railway servant working on A-I post lost one eye and two teeth as a resutlt of collision between two engines. He was declared by the Medical Officer as unfit for A-1 and B jobs but fit for C-2 job because of his defective vision. Class C-2 job was offered to him by the railway administration. He refused the offer and claimed compensation on the basis of total disablement. It was held that "the workman was entitled to compensation not on the basis of total but partial disablement". Obviously in this case there appears only reduction in earning capacity as an alternative employment was offered to the workman by the employer himself.

In a case where a workman suffered an injury by accident which did not in fact reduce his capacity to work but stamped him with a visible mark of physical deficiency or deformity as dissuaded the likely employers from employing him he would be deemed incapacitated for work in the sense that his earning capacity would clearly be altogether destroyed.

In *Sukhai* v. *Hukum Chand Jute Mills Ltd.*,[2] Sukhai was employed as a Copwinder in the jute Mill of the respondent. On 16-12-1951 while he was at work his left eye was injured by some flying Chinese clays balls. He was given first aid by the Chief Medical Officer and then sent to the Chinsurah Hospital where was his eyeball removed. He resumed his duty on 5-2-1952. He had been in the employment of the respondent company and was earning his usual wages and could do his usual work. On 4-6-1952, he made an application for compensation for injury to his eye. He described the injury as loss of vision of the left eye because eyeball was removed. It was held that the Court could make a "suspensory award." A suspensory award could be made when present earning capacity of workman was not affected but was likely to affect the capacity in future. In such a case the Court could make a declaration of the employer's liability when the evidence was fresh and then adjourn the matter reserving to each of the parties liberty to make such application in future as they might be advised. It was further observed that :

> "If a workman suffers as a result of an injury from a physical defect which does not in fact reduce his capacity to work but at the same time makes his labour unsaleable in any market reasonably accessible to him, there will be either total incapacity for work when no work is available to him at all or there will be partial incapacity when such defect makes his labour saleable for less than it would otherwise fetch. The capacity of a workman may remain quite unimpaired but at the same time his eligibility as an employee may be diminished or lost. If such a result ensues by the reason of the results of an accident, although the accident has not really reduced the capacity of the workman to work, he can establish a right of compensation, provided he proves by satisfactory evidence that he has applied to a reasonable number of likely employers for employment but had been turned away on account of the results of the accident visible on his person."

It was also contended on behalf of the respondent that the appellant was already blind of his left eye at the time of accident and that the Schedule to the Act was concerned only with the loss of a sound organ. In reply to this the court said that in that event the injury would be a non-scheduled injury and compensation would then be payable under section 4(1)(c)(ii) of the Act if permanent partial disablement was otherwise proved.

Ball v. *Willam Hunt*[3] is a similar case on the point. In this case a workman was

1. A.I.R. 1950 Nag. 201.
2. A.I.R. 1957 Cal. 601.
3. 1912 A.C. 496.

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blind of his one eye but the defect was not visible. After some time he suffered an employment injury necessitating the removal of the eye ball of the injured eye. He could not in consequence of this visible physical defect get employment although he was physically capable of doing any job which he could do before the occurrence of the accident. It was held that "incapacity for work" includes 'inability to get work' Incapacity for work in not same thing as incapacity to work. There is incapacity for work when a man has physical defect which makes his labour unsaleable in any market reasonably accessible to him

In *Rukiyabai* v. *George D' Cruz*[1] a labourer engaged in physical handling of cargo was incapacitated by a spinal injury and could not do any work which required locomotion. It was held to be a total disablement as defined in section 2(1)(1). Once there is loss of earning capacity, though the income remains the same, the workman becomes entitled to compensation and the fact the workman is getting the same wages after the accident as before the accident, is immaterial.[2]

In *New India Assurance Co. Ltd.* v. *Kotam Appa Rao and another*[3] the disability certificate issued by the Doctor estimated disability at 50% and noted "partial permanent disability. He cannot drive the vehicle". It was a non-scheduled injury and the Compensation Commissioner held it a case of total diablement and estimated injury to be 90% . In appeal it was contended that the Commissioner has no power to enhance the disability *suo motu*. It was held that from the note of the Doctor it is clear that the workman cannot work as driver of motor vehicle. The permanent partial disablement suffered by the workman is not by virtue of an injury specified in Part II of Shcedule I to the Act. In view of observation of the Doctor the Commissioner was right in holding the disablement as total in view of the definition in clause (l) of section 2(1).

Prescribed.—According to section (2)(1)(h) prescribed means prescribed by the rules made under the Workmen's Compensation Act.

Qualified Medical Practitioner.—Clause (i) of section 2(1) defines a medical practitioner. Qualified medical practitioners have been divided into two categories :

(i) Any person registered under any Central or State Act providing for the maintenance of a register of medical practitioners ; or

(ii) In any area where no such Act as mentioned above is in force any person declared by the State Government by notification in the Official Gazette to be a qualified medical practitioner.

Seaman.—According to section 2(1)(k) "Seaman" means any person forming part of the crew of any ship but does not include the master of ship. The word person includes both male and female. The expression 'crew' in law ordinarily means 'ship's company including master and other officer'.

Total Disablement.—Total disablement is defined in section 2(1)(l) of the Act. When a workman is incapacitated of doing any work which he was capable of performing at the time of accident resulting in such disablement, it is total disablement. Incapacity for all work is different from the incapacity for the work which a workman was doing at the time of accident. It is further provided in the Act that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I. It may also result from any combination of injuries in Part II of Schedule I, where the aggregate percentage of the loss of earning capacity, as specified against those injuries amounts to one hundred per cent or more.

1. A.I.R. 1961 Kerala 108.
2. *Saraswati Press Dehradun* v. *Nand Ram*, (1971) 2 L.L.J. 384. (All.)
3. (1995) 2 L.L.J. 436. (A.P.) ; *National Insurance Co. Ltd.* v. *Mohd. Salaam Khan* (1992) 2 L.L.J. 377 (A.P.)

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It was held in *National Insurance Co. Ltd.* v. *Mohd, Saleem Khan and another*[1] that if the workman is incapacitated to do all the work which he was capable of performing at the time of accident it is a case of total disablement. It may be that in view of the injuries the workman is capable enough to render some other sort of work, but still when there is incapacity to do the work which he was capable of performing by the date of the accident it is a case of total disablement. The certificate of the doctor of physical impairment and loss of physical function is not material in deciding the question of total disablement.

If the incapacity is of such a nature that a workman cannot get employment for any work he can undertake, it would be total permanent disability. The expression 'incapacitates a workman for all work' does not mean any and every work which he may do but means such work as is reasonably capable of being sold in the market. In other words, it does not mean capacity to work or physical incapacity. In case of total disablement there must be incapacity for all work resulting in hundred per cent loss of earning capacity. The Workmen's Compensation Act is concerned with physical injury as such, nor with the mere effect of such injury on the physical system of the workman. It is concerned only with the effect of such injury or of the diminution of physical power caused thereby, on the earning capacity of the affected workman. The loss of earning capacity is not a matter for medical opinion but the extent of it is a question of fact. It has got to be determined by taking into account the diminution or destruction of physical capacity as disclosed by the medical evidence and then it is to be seen to what extent such diminution or destruction could reasonably be taken to have disabled the affected workman from performing the duties which a workman of his class ordinarily performed and from earning the normal remuneration paid for such duties.[2] The court must take into consideration the nature of injury, the nature of the work which the workman was capable of undertaking and its availability to him. The employer's willingness to employ him in any other alternative employment may also have some relvance in determination of the extent of disablement.[3]

In *Hutti Gold Mines Co.* v. *Ratnam*[4] it was held that, "where an employee was discharged by the employer as if his injury rendered him unfit for any kind of work, it is clear proof that there was total disablement. The Court should not accept the explanation which is tendered for the first time before it that the employer did not make any offer to the employee of any other employment since no such employment was possible or available". The proper inference in such a case would be that not even that employer had in mind any doubt that there was no employment which such employee could hold after the injury. It would be, in such a case, for the employer to suggest in the course of proceedings that the employee could obtain suitable employment commensurate with his physical condition after the injury sustained by him. If, there was no such suggestion by the employer, it was surely unnecessary for the employee to produce evidence that he went from one place to another in search of employment but could find none agreeable to employ him.

The definition of 'total disablement' speaks of 'incapacity for all work', and not 'incapacity to work'. The use of preposition "for" instead of "of" makes it amply clear that it is the incapacity to get employment which is relevant and not the physical incapcity to undertake any work. If because of his apparent physical defects caused by an injury no one will employ a workman, however, efficient he may be, in fact, he has

1. (1992) 2 Lab. L.J. 377 (A.P.).
2. *Kalidas* v. *S.K. Mondal*, A.I.R. 1957 Cal. 660.
3. *Ahmed Abdul* v. *Sahgal*, (1966) 2 L.L.J. 31 (Bom.).
4. (1956) 2 L.L.J. 20.

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lost the power to earn wages as completely as if he was paralysed in every limb.[1] Where there is no longer any earning power remaining in the workman who was injured whatever may be his physical power to perform a duty in any sphere of activity, so long as no one could be persuaded to offer him any such employment the incapacity is complete.[2]

In *Pratap Narain Singh Deo* v. *Srinivasa*[3] a carpenter suffered injury in the course of his employment which resulted in amputation of left hand above elbow. Since a carpenter cannot work with one hand, disablement was held to be total and not partial.

In *P.K. Parmar* v. *Keval Constructions*,[4] Mr. Parmar was employed as a truck driver and as a result of injuries sustained by him he lost his right hand fingers, right elbow and right thigh. Relying on *Pratap Narain Singh Deo* v. *Srinivasa*,[5] it was held that the disablement was permanent total because the applicant has become unfit for work of a driver the work of driving can not be carried on with the left arm alone. The Court further held that permanent total disablement has to be judged from the point of view of the job which the employee was doing prior to the accident.

Wages.—The term "wages" as defined in section 2(1)(m) includes any privilege or benefit which is capable of being estimated in money. The definition is not exhaustive. The following are not wages :

(a). Travelling allowance or the value of any travelling concession ;

(b) Contribution paid by the employer of a workman towards ;

(i) any pension, or

(ii) any provident fund ;

(c) Any sum paid to a workman to cover any special expenses incurred on him by the nature of his employment.

(d) Leave carried forward to next year.

Annual leave with wages is certainly a privilege but this privilege only means that no wages due for that period shall be deducted from the wages. It does not mean that the workman can claim an equivalent amount in lieu of such leave. Thus, in calculating wages an addition to wages for the period of leave a workman was entitled to after working for one year is not justified,[6] unless there is in the contract of service an express provision for such amount of wages in lieu of the leave earned for the year.

The term "wages" has different meanings under the Payment of Wages Act, the Factories Act and Industrial Disputes Act. Compensation to an injured employee under the Workmen's Compensation Act is determined on the basis of wages of the injured employee. The wages has to be determined according to the definition of "wages" provided in this Act.

Privilege or benefit.—The following privileges and benefits are included in the wages :

(i) Free accommodation.[7]

(ii) Maternity benefit payable to a woman delivering a child.[8]

(iii) Dearness allowance.[9]

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1. *Ball* v. *William Hunt and sons Ltd.*, 1962 A.C. 496.
2. *Canara Public Conveyance Co.* v. *Usman Khan*, (1966) 1 L.L.J. 826.
3. A.I.R. 1976 S.C. 222.
4. (1985) 1 L.L.J. 98 (Guj).
5. A.I.R. 1976 SC 2228.
6. *M/s. J.C. Mills Ltd.* v. *Deshraj Singh*, A.I.R. 1952 MP. 119.
7. *B.M. and G. Engineering Factory* v. *Bahadur Singh*, A.I.R. 1955 All. 182.
8. *Ganpat Lal* v. *F.C. Judge*, A.I.R. 1958 Bom. 262.
9. *Gokulram Gupta* v. *Mills*, A.I.R. 1948 Bom. 158.

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(iv) Overtime pay or allowance.[1]

(v) Benefits in the form of food or clothing.

(vi) Gratuity payable to a workman on retirement.[2]

(vii) Value of any other concessions, benefit or privileges capable of being estimated in money.

(viii) Bonus.

Food allowance.—It was held in *Divisional Manager, Oriental Insurance Co. Ltd.* v. *Giriwal Transport Corporation and others,*[3] that from the nature of expenditure it was clear that "Bhatia" is a food allowance and as such it is included in wages.

Other allowances.—In *National Insurance Co. Ltd.* v. *Mohd. Mujtaba Khan and another,*[4] a driver met with an accident while driving a van. The workman was being paid rupees 900 per month as pay and Batta at the rate of rupees 20 per day. The Commissioner awarded compensation by including the Batta payable to the workman in the determination of monthly wages. But it was held by the High Court that the amount paid to the workman towards Batta cannot be included in wages.

Bonus.—The receiving of the bonus being a privilege or benefit enjoyed by a workman which was capable of being estimated in money was covered by the definition of the term "wages".[5] Where under a profit sharing scheme of a company bonus was declared on a date subsequent to the date of accident resulting in injury, the contention that the bonus did not become due until it was declared and was, therefore, not part of "total wages", was not accepted by the Court. On the contrary, it was held that the workman having earned that bonus under the scheme on the date of accident, if formed part of his wages and must be taken into account in assessing the compensation payable under this Act.[6]

Workman.—According to section 2(1)(n) workman means :

(i) A railway servant as defined in Clause (34) of Section 2 of the Railways Act, 1989 except those who are permanently employed in any administrative district or sub-divisional office of a railway. Out of this class also if a person is employed in any capacity as is specified in Schedule II he will be a workman.

(ia) Any person who is—

(a) a master, seaman or other member of the crew of a ship ;

(b) a captain or other member of the crew of an aircraft ;

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work already by a company,

and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, company, as the case may be, is registered in India, or ;

(ii) (a) Any person who is employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is express or implied, or oral or in writing.

1. *Bharat Heavy Plate and Vessels Limited* v. *Commissioner for W.C.*, (1983) 1 L.L.J. 477 (Allahabad).
2. *Badlu Prasad* v. *Trijugi Sitaram*, A.I.R. 1964 M.P. 42.
3. (1995) 2 L.L.J. 169 (Orissa)
4. (1994) 1 L.L.J. 259 (A.P.).
5. *Skailes* v. *Blue Anchorline*, (1941) 1 K.B. 360 ; *See also Maharashtra Sugar Mills Ltd.* v. *Ashru Jaiwant*, A.I.R. 1966 Bom. 240.
6. *Chiru Tanti* v. *Tata Iron and Steel Co.*, A.I.R. 1946 Pat. 437.

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(b) Where the workman is dead any reference to a workman shall include his dependants as defined in this Act.

The following are not workman :

(i) Any person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business. Both the conditions must-exist in order to exclude a person from the definition of a workman.[1]

(ii) Any person working in the capacity of a member of the Armed Forces of the Union of India.

To determine whether a person other than a railway servant is a workman or not, a reference to Schedule II, is necessary. The following conditions must be fulfilled before a person can be said to be a workman under this Act :

(i) his employment must not be of a casual nature ;

(ii) the employment must be for the purposes of the employer's trade or business, and

(iii) the employment must be of the nature mentioned in Schedule II of the Act.

Burden of proof.—The burden shall be upon the claimant to prove that he was a workman within the meaning of this section. However, the onus would be on the employer to prove that the condition which is necessary for the purpose of excluding a person from the category of workman exists. It has to be shown that the workman's employment was of a casual nature,[2] or he has not been employed for employer's trade or business. Every person employed by day, week, month or year is within the definition of a workman.[3]

Railway Servant.—A railway servant not employed in any such capacity as is specified in Schedule II and as defined as section 3 of the Indian Railways Act, 1890 and not employed in any administrative capacity, district or sub-divisional office of a railway is workman. The expression "employed upon railway" in Clause (12) of Schedule II means employed upon or employed in some work to be done or in regard to the various places or component parts of a railway, as enumerated in section 3 of the Railways Act. Hence, the workman who was employed only in loading refuse into the railway wagon and who was only walking over the platform for that purpose but was doing nothing to it did not come within the definition of a workman under the Workman's Compensation Act.[4]

In *Narayanan* v. *Southern Railway*,[5] the question was whether a licensed porter working under the railway administration can be said to be a workman under Workmen's Compensation Act, 1923 though a licensed porter is not included in Schedule II to that Act. It was held by the Kerala High Court that whether or not the relationship of employer and employee exists in a particular case is a question of fact. If it exists, the fact that payment is made at piece rate or by third person under an arrangement with the employer will not affect the relationship. The system of licensing of porter is in discharge of statutory obligation. The licensed porters are to handle not only the luggage of the passengers but also the parcels and luggage in the custody of the railway. He is to work under the overall supervision of officers of the railway and he works according to the roster drawn by the station authorities. He receives charges only at the rate stipulated by the railway authorities, being supplied by the railway administration uniforms, badges and bucklets to be used during work. He is being given

1. *Kochappan* v. *Krishnan*, (1987) 2 L.L.J. 174 (Ker.).
2. *Raj Rani* v. *Firm Nar Singh Das*, A.I.R. 1964 Punj. 315.
3. *Gorelal* v. *Dropadibai and others*, A.I.R. 1968 M.P. 24.
4. *Sahari Rajwarni* v. *Chief Executive Officer, Corporation of Calcutta*, A.I.R. 1955 Cal. 307.
5. (1980) 1 Lab. L.J. 395 (Ker.).

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free outdoor treatment in the railway hospital and is under the disciplinary control of the railway and is liable to suspension and his licence is liable for cancellation for misconduct, disobedience, inefficient working, etc. Therefore, there is a relationship of employer and employee between the railway administration and the licensed porters. Their employment is in connection with service of the railway. The mere fact that licensed porters were not in any of the categories mentioned in Schedule II of the Workmen's Compensation Act does not disentitle a porter from being a workman under section 2(1)(n)(i) if he is a railway servant. If, on the other hand, he falls under Schedule II even then he would be a workman if his income is within the limits fixed in section 2(1)(n)(ii) of the Act.

Employment of casual nature.—Casual means arising out of chance, uncertain, occurring or coming at uncertain time, depending on chance, unsettled, coming without design or premeditation. A casual labour is one who does casual or occasional job. It is a chance employment based on no contract to employ. The conception of circumstances under which a workman is entitled to compensation has widened and become liberall Now the trend of judicial decisions is construing the phrase "whose employment is of a casual nature" is that it refers to kind of service done by the employees rather than to the duration of the service.[1]

Two questions can be posed that help to determine whether the employment is of a casual nature or not. That is whether the employer not ordinarily requiring the employment of a labourer employs some one, or whether an employee not ordinarily standing in the need of employment by chance accepts a particular employment. It is these considerations taken together that are to be kept in mind to see whether the employment is of a casual nature or not. The burden is on the employer to prove that conditions necessary to exclude a person from the category of a workman exist and it has also to be shown that the workman's employment is of a casual nature.[2]

In *Varadarajulu Naidu* v. *Masaya Boyan*,[3] where the employer was a contractor for the construction of a road, the deceased was employed as mistri under him on Rs. 2.50 per day. The deceased brought with him four other coolies. The deceased was paid a lump sum of money every fortnight and he was a regular and continuous worker. It was held that he was a workman within the meaning of the Act.

In *Madan Mohan Verma* v. *Mohan Lal*,[4] the respondent was employed by the appellant as mechanic for installing a cotton ginning machine and chaff cutting machine on daily wages of Rs. 15/-. Three days later while Mohan Lal was taking the trial of the chaff cutting machine his right hand got stuck into the teeth of the gear roller of the machine and all his fingers and thumb of his right hand were cut off. It was held that fixation of machine and taking of trials were all part of the business of the employer. The mere ground that he was employed to install the machine and not for taking trial could not take him out of the purview of the definition of workman. Similarly the mere fact that the workman sustained injuries only three days after his employment would not be relevant for holding his employment of casual nature.

In *Kochu Velu* v. *Joseph*,[5] the question was whether a coconut climber employed periodically can be said to be a casual employee. In this case the respondent had engaged him to pluck nuts from his trees periodically. While at work, the appellant fell down and became permanently invalid. He claimed compensation but his claim was dismissed by the Commissioner. It was held by the Kerala H.C. that when a person is

1. *Sitharama* v. *Ayyaswami*, A.I.R. 1956 Mad. 212.
2. *Madanlal* v. *Mangali*, A.I.R. 1961 A.P. 16.
3. A.I.R. 1954 Mad. 1113.
4. (1983) 2 L.L.J. 332 (Allahabad).
5. (1980) 2 L.L.J. 220 (Ker.).

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being regularly employed periodically it cannot be said that he is employed casually. The employment here will not be of a casual nature for there is regularity in employment. It was further held that whatever might have been the concept of business at one time, today it has come to be recognised that even carrying on the avocation of agriculture can be said to be carrying on a business of agriculture. The term "business" is wide enough. The concept of the term "calling" is wide enough to comprise even business.

In *Kochappan* v. *Krishnan*,[1] it has been emphasised that the employment would not be of a casual nature if there was such regularity or periodicity of employment as to indicate that there was such a degree of mutuality in their obligations as to regard one as the employee and the other as the employer. Was there any obligation, by express or implied contract, to employ the very same person during every season ; or was there any statutory obligation to that effect.

In *Thomas* v. *Babu*,[2] the applicant Babu fell down from a Coconut tree of the appellant. He was working for 12 persons including the appellant and was paid at the rate of one rupee per tree from the appellant as well as from others. The appellant was a clerk in a school and his wife was a teacher there. The injured claimed compensation for his injury which was allowed by the Commissioner. But in appeal the High Court held that the coconut climber was a self-employed person not attached to anyone but plucking coconut of persons who send for him. The appellant and his wife are a clerk and teacher respectively and are not engaged in the business of coconut products. There is no evidence of employer-employee relationship between the parties even of casual character. When he was working for 12 persons, he was an independent self employed tree climber. Therefore the appellant was not liable to pay compensation under the Act.

Employed for the purposes of employer's trade or business.—The word 'employed' is capable of two meanings. First, in the sense of being engaged or occupied and secondly, in the sense of a contract of service being established between the workers and the owner of the factory. The latter denotes a relationship of master and servant between workman and employer. It is sufficient that such person is engaged in the service of the employer for howsoever short a period he may be engaged is immaterial.[3] How and by whom he had been employed is immaterial so long as he is actually employed. But the expression, "employed" does not necessarily involve the relationship of master and servant and a person would be a worker whether he is paid fixed wages or his remuneration is determined on the basis of the given terms of work done by him.[4]

The question is what can be said to be the employer's trade or business. Business means anything which occupies time, attention and labour of a man for the purposes of profit.[5] If a person merely lets a house or two which he owns he cannot be said to carry on a business of letting houses. The income in the form of the rent of the house is in his capacity as owner of that house not from carrying on any business relating to that property. Where a person engaged by owner for executing the repair or painting of the house receiving Rs. 3/- per day is injured, he has no right to compensation under the Act, because the owner of the house cannot be said to be carrying on the business of repairing but it is merely an odd job for which he employs casual labour.[6] There was no evidence of any agreement for regular employment in this case.

Whether a workman is employed for employer's trade or business is a question of

1. (1987) 2 L.L.J. 174 (Ker.).
2. (1995) 2 L.L.J. 141 (Kerala).
3. *A.A. Thaver Bros.* v. *Mariammal*, A.I.R. 1933 Rang. 208.
4. *State* v. *H.B. Nam Joshi*, A.I.R. 1956 Bom. 886.
5. *T.N. Sitharam Reddiar* v. *A. Ayyaswami Gounder*, AIR 1966 Mad 212.
6. *Gopalan Nandan* v. *Abadi Biben* (1976) 2 LLJ (Cal.).

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fact. In *Ramaswami* v. *Poongavanam*[1] a man was employed in handling or transport of goods from one place to another. He suffered injury while goods were being transported for and on behalf of the employer dealing in such goods. The employer was engaged in business to purchase and sell oil. It was held :

> "It is true that the appellants are not engaged in the business of transporting goods from one place to another and that their business is to purchase and sell oil as such. But it cannot be forgotten that the appellants cannot purchase and sell oil unless it is brought from one place and transported to their godowns before they could sell the oil. Though they are not directly in any sense doing the business of transporting goods from one place to another, nevertheless the transport of goods, in which they are dealing, is vitally connected with their business and should be considered to be part and parcel of their business in selling of oil. If their business was one of merely entering into contracts for sale of oil, which would be stocked at any particlar place, without their having to do anything in the matter of the stocking of such oil, certainly the transport of such oil could be separated from their business."

For these reasons the injured was held to be a workman employed for the purposes of employer's trade or business.

It is a question of fact in each case whether the agricultural operation in which the person was employed was directed towards profit by trade or business or solely for domestic consumption. The question whether the employment was for the purposes of trade or business depends upon the extent of the land, the number of trees, the yield therefrom and other factors.[2]

In *T.N. Sitharama Reddiar* v. *A. Ayyaswami Gounder*[3] the owner of a land employed a gang of diggers to deepen a well situate over his field. On March 26, 1949, a worker was injured by explosion of the dynamite used for digging operation. He lost his three fingers of left hand and one of his arm was amputated upto his elbow. The injured person was held to be a workman within the meaning of section 2(1)(n) and Schedule II, clauses (15) and (16) of the Act and entitled to compensation. It was observed that :

> "A workman employed in the construction of a well for the purposes of the employer's business of agriculture on daily wages which do not exceed Rs. 1,000/- per month is a workman under the Act. It is not necessary in such cases that the digging of well itself should be the trade or business of the employer. Agriculture being the occupation of the employer it cannot be denied that digging of well on the agricultural land was for the cultivation of land and thus for the purpose of employer's business."

Similarly, a farmer, who is engaged in agricultural pursuits and is using tractor or other contrivances which are driven by steam or mechanical power or electricity is covered by the Act. If he engages a workman in these pursuits and accident is caused by such tractors or contrivances, it will fall within clause (29) of Schedule II, of the Act.[4]

In *Hasbannessa* v. *Zahiruddin Mohd.*[5] a Taxi driver used to take out the cab on alternative days on commission basis after signing the garage book.

He could take out the Taxi at any time and anywhere he liked. There was no control of the Taxi owner over him. The driver got 12-1/2 per cent of the collection.

1. *Ramswami* v. *Poongavanam*, A.I.R. 1954 Mad. 218.
2. *Kochappan* v. *Krishanan*, (1987) 2 L.L.J. 174 (Ker.).
3. A.I.R. 1966 Mad. 212.
4. *Joginder Singh* v. *Naranjan Singh*, 1969 Lab. I.C. 329 (Punj.).
5. A.I.R. 1964 Cal. 61.

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Although the driver used to come on alternate days but there was no evidence whether he was free to come or not and whether he could absent himself for any number of days. There was no evidence as to who paid for the petrol. One day the Taxi dashed against a roadside tree and the driver was seriously injured. He ultimately died and his widow claimed compensation from the Taxi-owner under the Workmen's Compensation Act. It was held that :

> "The extent of control the owner had on the Taxi driver was the test to determine whether the driver was a workman or not. The facts that the decased Taxi driver had freedom to take out Taxi wherever it pleased him and to adopt any route of his choise were factors which suggested that the Taxi driver was not a workman within the meaning of the Act. There had to be an employment for holding the employer liable for compensation."

Similarly, a cleaner employed in connection with the operation and maintenance of transport vehicle is a workman within the meaning of item I of Schedule II of the Act.[1]

It was held in *Bapu Singh* v. *Pyaribai and others*[2] that an agricultural labourer employed in a farm which has a well fitted with electric motor is a workman under the Act. But a watchman working under the Official Liquidator is not a workman.[3] In order to be a workman under the Act it is necessary that an employee must be covered by some clause of Schedule II. The list given in Schedule is exhaustive and if an employee is one that would not come under any of the categories in Schedule II the definition of workman under section 2(1)(n) cannot be applied to such an employee.

In *Juthi Devi and others* v. *M/s. Pine Chemicals Ltd and another*,[4] one Sain Bahadur who was employed as a security guard through a contractor died due to heavy machines lying in the premises falling over him. He was employed in a premises where manufacturing process was intended to be carried on. It was held that authorities should avoid adopting the traditional conservative and literal approach while interpreting the provisions of the Act. The object of the Act is achievement of the ideals of social security. Viewed in this light the security guard employed in a factory which was yet to commence production would be workman.

Contract of employment if necessary.—In order to entitle a workman to claim compensation, a contract of employment express or implied between the workman and the employer is necessary. Any person, who voluntarily assists another man is not a workman. So also an independent contractor is also not a workman. Whether an apprentice is a workman or not depends upon the nature of contract. There must exist a relationship of employer and employee and merely use of terms wages or service, etc. is not sufficient to constitute such a relationship. If the contract under which a workman is employed is illegal it would not be a contract of service within the Workmen's Compensation Act.

In *Contractor Kattupuchi Arugmugham* v. *Nagammal and others*.[5] A was a contractor, S was his Mistry and D was a Coolie engaged for unloading wagons. Generally, A used to be present at place of work but Z supervised the coolies, D, who worked for about 8 months died by accident in the course of employment. The employment of D, the coolie was held to be of a casual nature but he was clearly employed for the purpose of loading the wagon at the time of accident, which was the business of the employer. The employment of the coolie by the mistry is a contract of

1. *Ram Sarup* v. *Gurden Singh*, 1969 Lab. I.C. 371 (Punj.).
2. (1990) 2 Lab. L. J. 311 (M.P.).
3. *Official Liquidator* v. *Kerala State Electricity Board*, (1990) 2 Lab L.J. 321 (Kerala).
4. (1991) 2 Lab. L.J. 386 (J. and K.).
5. A.I.R. 1949 Mad. 162.

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service within the meaning of the definition.

Persons employed by day or week or on piece rate basis.—It does not matter that a man is employed by day, week, month, or year. In *Assistant Director of Fisheries* v. *Mathumeentchyia*,[1] the services of divers were utilised by the Fisheries Department of the Madras Government for diving and fishing chanks in the Gulf of Mannar. They were held to be workmen. The very fact that the beginning of the season and the availability of an area in the sea for fishing is announced shows that the employer offers ample scope for the divers to work on a piece work basis and earn their remuneration. It was held that :

> "It cannot he laid down as a hard and fast rule that work done on a piece work basis will not bring about the employer-employee relationship. Even a piece work job can bring about employer-employee relationship."

In *State of Kerala* v. *Khadeeja Beevi*,[2] the question was whether a Mahout of an elephant employed by the State Government and enjoying benefits like family pension etc. was a workman. Item (xxii) of Schedule II states that persons employed in training, keeping or working elephants or wild animals are workmen. Therefore, it was held that the deceased Mahout was a workman.

In *Zoo Authority of Karnataka* v. *Ranga*,[3] the respondent was an employee of the Zoological gardens and zoo was transferred from Government to the Zoo Authority. It was held that with the transfer of gardens to Zoo Authority, a registered society, the respondent became an employee of the appellant, he ceased to be a Government servant and hence cannot claim compensation from the Government. It was further held that the respondent, who was keeping chimpanzee, a wild animal in the Zoo would be a workman in view of item (xxii) of Schedule II Which provides that a person employed in keeping wild animals is a workman. The respondent will, therefore, be entitled to claim compensation for any injury suffered by him in an accident arising out of and in the course of his employment.

In *Hastimal* v. *A. Arjunan*[4] the workman was engaged in loading nitric acid cans in vehicle. The acid spelled and injured his left eye. He lost his vision in left eye. He was getting Rupees 12 per day for 24 days in a month. The percentage of loss of earning capcity is given as 30 per cent under Entry 26 of Part II of Schedule I. It was held that a person provided with work for 24 days in a month on daily wages is a workman and loss of vision in one eye is a permanent partial disablement and the workman is therefore, entitled to compensation.

Government Servant.—It was held in *Radhamony and others* v. *Secretary, Dept. of Home Affairs*[5] that Section 2(1)(n) read with Schedule II of the Workmen's Compensation Act makes it clear that the driver of a vehicle comes under the category of a workman. The Act has not made any distinction between the driver in a Government and non-government employment. Therefore driver in a Police Department would be a workman and entitled for compensation on sustaining injury or succumbing to it.

Difference between Workman and Contractor.—The relationship of employer and workman is established if the employer has some measure of control and could regulate the action of the employee during the time he is engaged in doing his work.[6] The distinction between a workman and a contractor is as follows :

1. A.I.R. 1963 Mad. 9.
2. (1989) 2 Lab. L.J. 438 (Kerala).
3. (1989) 1 Lab. L.J. 237 (Karnataka).
4. (1993) 2 L.L.J. 55 (Madras)
5. (1995) 1 L.L.J. 376 (Kerala).
6. *K.R. Reddiar Gold Merchant and Jeweller*, v. *Nagamuthu* (1956) K.S. M.L.J. 139.

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(1) A workman agrees himself to work and a contractor agrees to get other person to work. A workman who himself agrees to work does not cease to be a workman merely because he gets some other persons also to work along with him. The test whether a workman is an independent contractor, or a workman is whether he has agreed to work personally. If he has, he is a workman and the fact that he takes assistance from other persons also would not affect his status.[1]

(2) A workman is under the control and supervision of the employer in respect of the details of the work. A contractor is a person who, in the pursuit of an independent business, undertakes to do specific work for other person without submitting himself to his control in respect of the details of the work.

(3) A workman is a person who enters into a contract of service with the management ; a contractor is one who enters into a contract for service and works independently of any control or supervision of the employer.

In *Chintaman Rao* v. *State of M.P.*,[2] there was an agreement between the management of a Bidi Company and an independent contractor that the contractor would receive tobacco from the management and supply them rolled in bidis for consideration. He could manufacture bidis wherever he pleased and his liability was discharged by delivering bidis in the factory. The contractor was not under the control of management of the factory and had not to work in the factory. The contractor was held by the Court not to be employed by the management as a workman but was an independent contractor who performed his part of contract by making bidis and delivering them at the factory.

In *Ganesh Foundry Works* v. *Bhagawati and others*,[3] one K was a regular employee of Sukhjit Starch and Chemicals Ltd. On 19th Feb. 1977, he came back to his residence after his duty at about 9 a.m. At about 10.30 a.m. he was summoned by appellant factory to cure some defect in the factory premises for consideration of a lump-sum amount of Rs. 25. While working there K received injuries and died. It was held that the deceased was not workman for there was a contract for service and not a contract of service with the Ganesh Foundry Works.

Section 2(2).—This section is in the nature of an explanation. It says that the exercise and performance of the powers and duties of a local authority or of any department (acting on behalf of the Government) shall for the purposes of this Act unless a contrary intention appears, be deemed to be the trade or business of such authority or department.

Section 2(3).—The Central Goverment or the State Government, by notification in the Official Gazette, after giving not less than three months' notice of its intention so to do, may, by a like notification add to Schedule II any class of persons employed in any occupation which it is satisfied is a hazardous occupation, and the provisions of this Act shall thereupon apply, in case of a notification by the Central Government, within the territories to which the Act extends, or, in the case of a notification by the State Government, within the State, to such classes of persons :

Provided that in making addition, the Central Government or the State Government, as the case may be, may direct that the provisions of this Act shall apply to such classes of persons in respect of specified injuries only.

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1. *D.C. Works Ltd.* v. *State of Saurashtra*, A.I.R. 1957 S.C. 264.
2. A.I.R. 1958 S.C. 388.
3. (1985) 1 L.L.J. 95 (P and H.).

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CHAPTER II
WORKMEN'S COMPENSATION

Section 3. Employer's liability for Compensation.— The liability of an employer to pay compensation is limited and is subject to the provisions of the Act. Under sub-section (1) of section (3) the liability of the employer to pay compensation is dependent upon the following four conditions :

(1) Personal injury must have been caused to a workman ;
(2) Such injury must have been caused by an accident ;
(3) The accident must have arisen out of and in he course of employment ; and
(4) The injury must have resulted either in death of the workman or in his total or partial disablement for a period exceeding three days.

The employer shall not be liable to pay compensation in the following cases :

(a) If the injury did not result in total or partial disablement of the workman for a period exceeding three days ;
(b) In respect of any injury not resulting in death or permanent total disablement the employer can plead :
  (i) that the workman was at the time of accident under the influence of drinks or drugs ;
  (ii) that the workman wilfully disobeyed an order expressly given or a rule expressly framed for the purpose of securing safety of workmen ; and
  (iii) that the workman having known that certain safety-guards or safety devices are specifically provided for the purpose of securing the safety of workman, wilfully disregarded or removed the same.

The employer can succeed in his plea only if he can establish that the injury was attributable to any one of the above factors.

Employer's Liability in case of occupational diseases.—Sub-section (2) of section 3, deals with the payment of compensation in case of an injury resulting from occupational diseases. The list of the occupational diseases is contained is Schedule III of the Act. Schedule III is divided into three parts, A, B and C. The disease contracted must be an occupational disease peculiar to the employment specified in Schedule III. In respect of every such disease mentioned as occupational disease in Schedule III, a list of a number of employments is given. To support any claim for compensation in case of occupational disease in Part A no specified period of employment is necessary ; for diseases in Part B the workman must be in continuous employment of the same employer for a period of six months in the employment specified in that part ; and for diseases in Part C the period of employment would be such as is specified by the Central Government for each such employment whether in the service of one or more employers. The contracting of any disease specified in Schedule III shall be deemed to be an injury by accident arising out of and in the course of employment unless the contrary is proved.

Part A of Schedule III.—The employer shall be liable to pay compensation for an injury resulting from an occupational disease mentioned in Part A of Schedule III, if a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment.

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The contracting of the disease shall be deemed to be an injury by accident and unless the contrary is proved the accident would be deemed to have arisen out of and in the course of employement.

Contracting of an occupational disease after discontinuance of service.—If any such disease as is mentioned in Part A of Schedule III develops after a workman has left the employment, no compensation shall be payable to him.

Part B of Schdule III.—In case of contracting of any disease mentioned in Part B of Schedule III the employer shall be liable if a workman while in the service of an employer in whose service he has been employed for a *continuous period of not less than six months* in any employment specified in Part B of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment. The contracting of the disease shall be deemed to be an injury by accident within the meaning of this section, and unless contrary is proved, the accident would be deemed to have arisen out of and in the course of the employment.

Contracting of an occupational disease after discontinuance of service—The employer shall be liable to pay compensation to a workman where a workman contracts any disease as aforesaid after he has left his employment in the following conditions :

1. If a workman has served under any employer in any employment specified in Part B of Schedule III for a continuous period of six months.

2. If a workman has after cessation of his service contracted any disease specified in Part B of Schedule III as an occupational disease peculiar to that employment.

3. If it is proved that such disease arose out of the employment.

The contracting of the disease shall then be deemed to be an injury by accident within the meaning of this section.

Part C of Schedule III.—Where a workman contracts any disease specified in Part C of Schedule III the employer shall be liable :

(1) If a workman was in the service of one or more employers in any employment specified in Part C of Schedule III for such continuous period as the Central Government may specify in respect of each such employment ; and

(2) If he contracts any disease specified therein as an occupational disease peculiar to that employment.

If the above two conditions are fulfilled, the contracting of the disease shall be deemed to be an injury by accident within the meaning of section 3 of the Act and unless contrary is proved the accident shall be deemed to have arisen out of and in the course of the employment.

According to the first proviso to sub-section (2) of section 3 if it is proved :

(a) that a workman while in service of one or more employers in any employment specified in Part C of Schedule III has contracted a disease specified therein as an occupational disease peculiar to the employment during a continuous period which is less than the period specified under sub-section (2) of section 3 for that employment, and

(b) that the disease has arisen out of and in the course of employment ; the contracting of such disease shall be deemed to be an injury by accident within the meaning of section 3 of the Act.

Contracting of an occupational disease after discontinuance of service.—Where a workman contracts an occupational disease after discontinuance of his service the employer shall be liable to pay compensation :

(1) If it is proved that the workman has served under one or more employers in any employment specified in Part C of Schedule III for such continuous period as the

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Central Government may specify in respect of each such employment ;

(2) If he has after cessation of his service contracted any disease specified in Part C of Schedule III as an occupational disease to that employment ; and

(3) If it is proved that such disease arose out of the employment.

The contracting of the disease shall be deemed to be an injury by accident within the meaning of this secti .

Section 3(2-A).—In case of any employment mentioned in Part C of Schedule III where there are more than one employers, sub-section (2-A) of section 3 authorises the Commissioner to fix up the extent of responsibility of different employers in respect of the amount of compensation payable to a workman.

Section 3(3).—The Central Government or the State Government after giving, by notification in the Official Gazette, not less than three month's notice of its intention so to do, may by a like notification, add any description of employment to the employments specified in Schedule III and shall specify in the case of employments so added the diseases which shall be deemed for the purposes of this section to be occupational disease peculiar to those employments respectively and thereupon provisions of sub-section (2) shall apply in the case of a notification by the Central Government, within the territories to which this Act extends or, in case of a notification by the State Government within the State as if such diseases had been declared by this Act to be occupational diseases peculiar to those employments.

Section 3(4).—The employer is liable to pay compensation only if the disease can be directly attributed to a specific injury by accident arising out of and in the course of his employment. Exceptions to this rule are the cases covered by sub-sections (2), (2-A) and (3) of section 3.

Employment.—The concept of employment implies three elements : an employer, an employee and a contract of employment between them. In other words, employment means a contract of service between the employer and employee wherein the employee agrees to serve the employer under his control and supervision.[1] Employment under the present Act is not limited to actual work or place of work but extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do. To justify any claim for compensation existence of a contract of employment express or implied between the employer and the injured workman is necessary.

Personal injury.—Injury ordinarily refers to a physiological injury. Personal injury does not mean only physical or bodily injury but includes even a nervous shock, a mental injury or strain which causes a chill. It is a term wider than bodily injury. In *Indian News Chronicle* v. *Mrs. Lazarus*,[2] a workman, employed as an electrician had frequently to go to a heating room from a cooling plant, was attacked by pneumonia and died after a short illness of five days. The Court held that the injury caused by an accident is not confined to physical injury and the injury in the instant case was due to his working and going from a heating room to a cooling plant as it was his indispensable duty.

In case of personal injury caused to a workman by an accident arising out of and in the coure of employment unless the right to compensation is taken away under section 3(5), the employer becomes liable to pay the compensation as soon as the aforesaid personal injury is caused to the workman.[3]

Mere vague offer to keep and continue the workman in the employment even after the injury and the resultant disablement is not sufficient to disqualify the workman's

1. *Chintaman Rao* v. *State of M.P.*, A.I.R. 1958 S.C. 388.
2. *Indian News Chronicle* v. *Mrs. Lazarus*, A.I.R. 1961 Punj. 102.
3. *Pawan Narain Singh* v. *Shrinivas*, A.I.R. 1976 S.C. 222.

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claim under section 3 of the Act.[1]

Accident.—The expression "accident" has not been defined in the Act. It means any unexpected mishap, untoward event, or consequence brought about by some unanticipated or undesigned act which could not be provided against. The basic and indispensable ingredient of the accident is the unexpectation. Whether a particular occurrence is accident or not, it must be looked upon not only from the point of view of the person who causes it but also from the point of view of the person who suffers it. Although an accident means a particular occurrence which happens at a particular time but it is not necessary that the workman must be able to locate it in order to succeed in his claim. There would be cases, where a series of tiny accidents, each producing some unidentifiable results and operating cumulatively to produce the final condition of injury constitute together an accident within the meaning of this section.[2]

Arising out of and in the course of employment.—The expression "arising out of" suggests the cause of accident and the expression "in the course of" points out to the place and circumstances under which the accident takes place and the time when it occurred. A causal connection or association between the injury by accident and employment is necessary. The onus is on the claimant to prove that accident arose out of and in the course of employment.[3] The employment should have given rise to the circumstances of injury by accident. But a direct connection between the injury caused by an accident and the employment of the workman is not always essential. Arising out of the employment does not mean that personal injury must have resulted from the mere nature of employment and is also not limited to cases where the personal injury is referable to the duties which the workman has to discharge.[4] The words 'arising out of employment' are understood to mean that "during the course of the employment, injury has resulted from some risk incidental to the duties of the service which unless engaged in the duty owing to the master it is reasonable to believe the workman would not otherwise have suffered. There must be a causal relationship between the accident and employment. If the accident had occurred on account of a risk which is an incident of the employment ; the claim for compensation must succeed unless of course the workman has exposed himself to do an added peril by his own imprudence."[5] This exression applies to employment as such, to its nature, its conditions, its obligations and its incidents and if by reason of any of these, a workman is brought without with the zone of special danger and so injured or killed, the Act would apply.[6] The employee must show that he was at the time of injury engaged in the employer's business or in furthering that business and was not doing something for his own benefit or accommodation.[7] The question that should be considered is whether the workman was required or expected to do the thing which resulted in the accident though he might have imprudently or disobediently done the same. In other words, was the act which resulted in the injury so outside the scope of the duties with which the workman was entrusted by his employer as to say that the accident did not arise out of his employment.[8]

In the course of employment refers to the period of employment and the place of work. It is neither limited to the period of actual labour not includes acts necessitated by the workman's employment. "Another important question", as pointed out by Francis H. Bohlen, is, "how far a servant is entitled to go outside his appointed shpere in

1. *Jayibharat Saw Mill* v. *Babulal Ambalal Sodh Parmar*, (1992) 2 Lab. L.J. 186 (Guj.).
2. *Bai Shakri* v. *New Manekchowk Mills Co.*, A.I.R. 1961 Guj. 34.
3. *M/s. Chowgule and Co. (Pvt.) Ltd.* v. *Smt. Felicidade*, A.I.R. 1970 Goa 127.
4. *Central Glass Industries* v. *Abdul Hussain*, A.I.R. 1948 Cal. 12.
5. *M. Mackenzie* v. *I.M. Issak*, A.I.R 1970 S.C. 1906.
6. *Nawab Ali* v. *Hanuman Jute Mills*, A.I.R. 1933 Cal. 513.
7. *Janki Ammal* v. *Divisional Engineer Highway, Kozhikode*, (1956) 2 KLT 230.
8. *Smt. Koduri* v. *Palongi Atchamma*, 1969 Lab. I.C. 1415 (Andh. Pra.).

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obedience to the orders of a superior. Of course, if such superior has the power to fix the spheres of labour for the workman, a workman, by obeying them, merely passes into a new "course of employment", but even if he has not, it seems that the servant is justified if he honestly believes that such superior is authorised to employ him.[1] An injury received within reasonable limits of time and space, such as while satisfying thirst or bodily needs, taking food or drink is to be regarded as injury received in the course of employment.[2]

In *R.B. Moondra and Co.* v. *Mst. Bhanwari*[3] the deceased was employed as a driver on the appellant's truck used for the purpose of carrying petrol in a tank. On the previous day he had reported to his employer that the tank was leaking and so water was put in it for detecting the place from where it leaked. The next morning the deceased was asked by the appellant to enter the tank to see from where it leaked. Accordingly, he entered the tank which had no petrol in it and for the purpose of detecting the leakage he lighted a match stick. The tank caught fire and the deceased received burn injuries and later on succumbed to death. In this case it was contended that the workman has himself added to his peril by negligently and carelessly lighting a match stick inside the petrol tank. It was held that the accident arose out of employment and the act of lighting the match stick even if rash or negligent would not debar his widow from claiming compensation. If the act leading to the accident was one within the sphere of employment or incidental to it or in the interest of the employer, then the accident would be said to arise out of and in the course of employment and the plea of added peril would fail. In this case the deceased did something in furtherance of his employer's work when the accident occurred although he was careless or negligent inasmuch as he lighted the match stick instead of using a torch to detect the leakage. But because the tank was empty and was partly filled with water on the previous night, he cannot have little reason to foresee the risk involved.

In *M. Mackenzie* v. *I.M. Issak*[4] Shaikh Hussan Ibrahim, a seaman on ship "Dwarka" was last seen at about 3 a.m. on Dec. 16, 1961 on the Tween Deck and was found missing at 6.15 a.m. in the morning. A search was undertaken but the dead body was not found. The Additional Commissioner made an inspection of the ship and found no material evidence which could lead to the inference that the death was caused by an accident which arose out of seaman's employment. It was held that the Commissioner did not commit any error of law in reaching to the above finding. No compensation was payable in this case because on the facts there was no material for holding that death took place on account of accident which arose out of his employment. It was further held that in the case of death caused by the accident the burden of proof rests upon the workman to prove that the accident arose out of employment as well as in the course of employment. But it is not necessary that the workman must prove it by direct evidence. It may be inferred when the facts proved justify the inference.

In *Trustees Port of Bombay* v. *Yamunabai*,[5] a bomb placed in the premises of a workshop by some unknown person exploded and caused injury to a workman. It was held that the workman was not responsible for placing of the bomb, and the injury due to its explosion was caused at the time and place at which he was employed, therefore the injury was the result of an accident arising out of his employment. The rule is that if a particular accident would not have happened to a workman had he not been

1. Francis H. Bohlen 25 Harv. L.Rev. 418.
2. A.I.R. 1968 Cal. 129.
3. A.I.R. 1970 Raj. 111.
4. A.I.R. 1970 S.C. 1906 ; *Ibrahim Mohammad Issak* v. *Mackinon Mackenzie and Co.*, (1956) I.L.L.J. 554 (Bombay) reversed.
5. A.I.R. 1992 Bom. 382.

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employed to work in the particular place and condition, it would be accident arising out of the employment.

Likewise where the workmen, working in some factory are injured due to crashing down within the factory premises of some aircraft, it will be an injury resulting from an accident arising out of the employment for the workmen are not responsible for the air crash and they are exposed to that danger by reason of their presence on the place of accident because of their employment.

A workman who was employed to repair clocks at various stations was stabbed in a railway compartment while he was in transit. It was held that the death of the workman in question was due to an accident arising out of and in the course of his employment.

In the course of employment means during the currency of employment.[1] In order to succeed in his claim a workman has to prove that he was at the time of injury engaged in the employer's business or in furthering that business and was not doing something for his own benefit or accommodation.[2] He must show that he was doing something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of service.[3] The distinction between "arising out of", and "arising in the course of" employment as pointed out by Bombay High Court is that the latter suggests the point of time, *i.e.*, the injury must be caused during currency of employment and the former conveys the idea that there must be some sort of connection between the employment and the injury caused to a workman as a result of accident.[4]

In *Smt. Koduri* v. *Polongi Atchamma*,[5] a person was the employee in the lorry belonging to his employer carrying quarry material from the quarry site to the work spot of the P.W.D. His duties were to load the material on the lorry and to go along with the same for unloading the material at the work-spot. While the lorry was moving he attempted to hit a rabbit passing on the road and in the attempt he fell down from the lorry and died. His wife claimed compensation for the loss of life of her husband. It was held that she was not entitled to compensation for "it is not enough that injury should have been sustained by the workman during the period of his employment, it should have been in the course of the employment. The act which resulted in the accident must have some connection with the work for which the workman is employed. The workman must have been doing something which is part of his service though it need not be his actual work ; it should be work naturally connected with the class of work and the injury must result from it. Applying this principle by no stretch of imagination can it be said that hitting a wild rabbit which ran across the truck was part of service of the workman for which he was employed. The mere fact that the workman was during the particular period travelling in the employer's truck with the quarry material from the quarry site to the work spot is not enough."

In *National Iron and Steel Co. Ltd.* v. *Manorma*[6] a boy was employed by the appellant in a tea shop and it was part of his duty to take tea from the shop which was situated outside the factory gate to various persons working in the factory. One day when the boy was coming out of the factory after serving the tea to the workers he passed through a violent mob of factory workers who were leaving the factory. This mob attacked the police and the police had to fire upon the mob in self-defence. Unfortunately, the boy was severely wounded by a bullet injury and died the following

1. *Trustees, Port of Bombay* v. *Yamunabai*, A.I.R. 1952 Bom. 382.
2. *Janki Ammal* v. *Civil Engg. Highways, Kozhikode*, (1956) 2 Lab. I.J. 233.
3. *Tobacco Manufacturers (India) Ltd.* v. *Mrs. Marian Stewart*, A.I.R. 1950 Cal. 164.
4. *Trustees, Port of Bombay* v. *Yamunabai*, A.I.R. 1952 Bom. 382.
5. (1969) Lab. I.C. 1415 (Andh. Pra.).
6. *National Iron and Steel Co. Ltd.* v. *Manorama*, A.I.R. 1953 Cal. 143.

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day in the hospital. The mother of the boy claimed compensation. It was held that the accident arose in the course of employment and death occurred because of the risk to which he was exposed by the nature of his employment.

In *Public Works Department* v. *Kaunsa*[1] Gokul, a gang Jamadar while going to collect salary of the labourers from the office of the Public Works Department was murdered in the way at a place on which he sat down to take his meals near a well. He was found dead at a considerable distance from the place where other members of his gang were actually working on the road. Applying the principle laid down in *Trustees of the Port of Bombay* case the court held that the death of Gokul was an accident arising out of his employment because the accident would not have happened if he had not been engaged in that employment. In this case the accident arose because of the nature of employment that exposed him to some particular danger.

The employer's duty to his servants is to take reasonable care for their safety. Safety means the safety of the premises and the plant and to the method and conduct of the work. Their duty is to take reasonable steps to avoid exposing the servant to a reasonable risk of injury.[2] Thus, where under the rules of the Company nobody was allowed to graze cattle inside the mill premises but the wife of a worker of the Company attempted to graze her cattle inside the premises. The watchman asked her not to graze inside the premises. This infuriated her husband who assaulted the watchman, resulting in his disablement. It was held that the injury of the watchman arose out of employment and in the course of enforcing the rules, therefore, he is entitled to get compensation.[3]

Chairman Madras Port Trust, Madras v. *Kamala*[4] it was held that fetching food is part of employee's duty. Therefore, accident to an employee while fetching food is in the course of employment.

In *Imperial Tobacco Co. (India) Ltd.* v. *Salona Bibi*,[5] a workman who suffered from high fever was recommended two days leave by the doctor. When he returned on the third day the doctor found him suffering from malaria and Broncho pneumonia. He was again granted three day's leave. After expiry of the leave when he came in a riskshaw to report to the doctor, his condition was so serious that he had to be taken upstairs to the dispensary in a stretcher. The doctor found him in a almost dying condition and, therefore, hastened to administer injection but he died after a few minutes. It was held that, "as the stress and strain of the journey was responsible for causing or precipitating the workman's death, there was an accident arising out of and in the course of employment."

In *Kamla Bai* v. *Divisional Suprintendent Central Railway, Nagpur*,[6] deceased, the appellant's husband was a goods train driver. While on duty he collapsed and died. He took rest at intermediate stations. He died while talking to the guard at wayside station who gave red signal to stop the train. It was held that the death of the driver was an accident in the sense that it was unexpected without there being any design on the part of the workman. But in order to see whether the accident was one arising out of and in the course of employment it has to be seen whether there is unequivocal evidence that the workman died because of particular strain during the course of his duties. The fact that the workman died a natural death because of a disease from which he was suffering and that he died on account of normal wear and tear of his employment are not sufficient to entitle the claimant to the compensation. It must also be proved that the

1. (1967) 1 L.L.J. 344 (M.P.).
2. *Tremain* v. *Pike*, (1970) 1 Kni. Ind. Rep. 318.
3. *Management of Sri Sabari Mills Ltd.* v. *M. Kulandai* (1984) 1 L.L.J. 254 (Mad.).
4. A.I.R. 1970 Mad. 386.
5. A.I.R. 1956 Cal. 458.
6. (1971) 1 L.L.J. 603 (Bom).

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deceased not only died because of the heart disease (as reported in this case) from which he was suffering but also because of some contributing cause on account of his employment or his duties which he was performing. In the present case it was held that there was no evidence to show any causal connection between death of the workman and his employment and his death was not due to any particular strain which he had on account of his employment. In *Devshi Bhanji Khona* v. *Mary Burno*,[1] it was held that where the death of a workman takes place due to heart attack while carrying a load, the death shall be deemed to have arisen out of and in the course of employment. There is causal connection between the death and employment.

In *M/s. J.D. and Co. Mills.* v. *E.S.I Corporation*,[2] the mechanic and fitter employed to disconnect the crushing machine from the rest of the moving machinery was absent from the premises. The crushing machine was running without any business. A workman who was an unskilled worker and whose duty was to feed the oil mill by pouring groundnut seeds into crusing machine, kicked of the moving pulley to stop the running of the crushing machine. His leg got caught between the pulley and the belt. He was pulled up to a height of about six feet from where he fell down and died instantaneously. The accident was held to have arisen out of and in the course of employment because the employer was guilty of negligence in not complying with safety rules and whatever the deceased workman did was in the interest of the employer and in order to prevent the machine from getting damaged thereby resulting in loss to the employer.

In *Mackinnon Mackenzie and Co. Ltd.* v. *Miss Velma William*,[3] the deceased was a seaman, an employee of the shipping company in Calcutta. One day when the ship was on its voyage he tried to commit suicide by jumping over board but was prevented by his co-workes and was back to his room. Querried by the master of the ship he said that he was worried because he did not receive any letter from his home. He also promised never to attempt to commit suicide in future. The surgeon who examined him certified that he was mentally deranged and should, therefore, be kept under constant supervision using force if necessary. After being kept in the hospital for a few days he was one day allowed on medical advice to go on the deck under escort. In the next morning while walking up and down on the deck the seaman suddenly seized both the guards, threw them sideways with such force that they fell down on the deck and then jumped overboard. On a claim for compensation made by his sister it was held that :

> "The accident in this case was not due to any personal injury caused to the workman by any accident arising out of and in the course of his employment, so as to make the employer liable for it. Merely, because the seaman was in service, his continuity of service did not bring him within that expression.....In cases of suicide resulting from insanity or mental derangement the onus lies upon the applicant to show that the death is due to accident, and that insanity is the direct result of injury."

Similarly in Sri *Jayaram Motor Service* v. *Pitchammal*,[4] a night watchman of the appellant company had died 90 minutes after return from work. The question was whether death, that occurred one and a half hour after the employee had ceased to work, can still be said to be in the course of employment. It was held that if death was the result of stress and strain which the employee suffered earlier during the period of work, a connection is established between the employment and his death. Thus, in this case death was held to be in the course of employment.

1. (1985) 2 Lab. L.J. 70 (Ker.).
2. A.I.R. 1963 A.P. 210.
3. A.I.R. 1964 Cal. 94.
4. (1982) 2 L.L.J. 149 (Mad.).

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In *Superintending Engineer Parambikulam Aliar Project, Pollachi* v. *Andammal*[1] the deceased was employed in Irrigation department to regulate the flow of water in the canal. He was assaulted by some people who were inimical towards him in connection with his employment in the release of water for the purpose of irrigation. The death was held to have arisen out of and in the course of employment. The court observed that the deceased had to be in the place where he was done to death in the course of his employment for discharging his duties. By reason of his being in the particular place, he had to face the indignant agriculturists who had unauthorisedly diverted the water from the canal and about whom he had made a complaint and by reason of that he had to face a peril and the accident resulting in his death was caused by reason of the peril.

In *Riley* v. *William Holland and Sons Ltd.*,[2] the applicant was employed at the respondent's mill. He was discharged on Wednesday. By the usage of the mill, the wages were made upto Wednesday and were payable at the mill on Friday. The applicant went to the mill on Friday for her wages which were paid to her. On going down the stairs of the mill she slipped and was injured. The accident was held to have arisen out of and in the course of her employment.

In was held in *Zubeda Bano and others* v. *Maharashra S.R.T. Corpn. and others*[3] that the liability of the employer under the Act is conceptually quite different from the liability under tort. The Act should be construed in a *broad and liberal manner.* Therefore the death of a bus driver of a State Road Transport Corporation who sustained heart attack and collapsed while changing destination name board is death arising out of and in the course of employment.

In *Director (T and M) D.N.K. Project* v. *Smt. Buchitalli*,[4] a factory worker having a heart disease, while coming out of the factory, profusely sweated and died after four hours of work inside the factory premises. It was held that the stress and strain of four hours of work in the factory must be taken to be an accelerating factor to death and therefore, the employer is liable to pay compensation.

In *Raj Dulari* v. *Superintending Engineer P.S.E.B. and another*,[5] a work charged employee under the Punjab State Electricity Board was engaged in fixing electric wire on poles. While he was working beyond his duty hours under the direction of lineman to complete the job a bus came at a high speed and dragged the electric wires hanging on the road with the result the pole on which he was working was broken from the middle and he fell down and died instantaneously. It was held that the accident occurred in the course of employment. If a workman continues to work beyound his duty hours on a job directed by his superior, he continues to be on duty.

In *Salamabegum* v. *District Branch Manager, Maharashtra State Co-operative Land Development Bank Beed and another*,[6] a Jeep driver of Bank took the officers of the bank to a village in connection with recovery proceedings conducted by the bank. He rested the jeep in the rest house and went to the market where he was assaulted by some unknown persons in the crowd and was found dead. It was held that the expression "accident arising out of and in the course of employment" rather denotes a point of time than a factual connection with the employment and the accident. The risk incurred by the driver for going to the market was incidental to his employment of taking the jeep to the village. Thus the accident having taken place without the fault of the driver and while he was on duty in the village must be taken to be arising out of

1. (1983) 2 L.L.J. 326 (Mad.).
2. (1911) 1 K.B. 1029.
3. (1991) 1 Lab. L.J. 66 (Bom.).
4. (1989) 1 Lab. L.J. 259 (Orissa).
5. (1989) 2 Lab L.J. 132 (P. and H.)
6. (1990) 1 Lab. L.J. 112 (Bom.).

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and in the course of employment.

In *State of Rajasthan* v. *Smt. Kanta*,[1] a driver in the Irrigation Survey Sub-division was on election duty all the 24 hours and he was found dead. It was held that he died in the course of employment. It was further held that unless it is established by cogent evidence from the employer that the employee has not died in the discharge of his duty, it will be presumed that the employee died in the course of employment.

In *New India Assurance Co. Ltd.* v. *R. Shridhara and another*,[2] a manufaturer had taken a Group Insurance covering four employees of the establishment to the amount of Rs. 25,000/- each in respect of any miscellaneous injury suffered by the employees in the manufacturing unit. It was held that the Insurance Company was liable to pay under the policy. The fact that the Insurance Company has different types of policies inculding the one under the provisions of Workmen's Compensation Act, will not absolve the Insurance Company from paying under the Miscellaneous Group Insurance Scheme. There is no dual liability of the Insurance Company to the insured as well as the workmen.

In *Senior Divisional Personnel Officer, S. Rly Trichy* v. *Smt. Kanagambal*,[3] the respondent, employed as a points-man in Railway, was assaulted by unknown person, while on duty resulting in his death. The death was held to be arising in the course of and out of employment and the workman was entitled to compensation.

If the accident has occurred on account of the risk which is an incident of employment, it has to be held that the accident has arisen out of the employment. Since in driving a motor vehicle risk of accident is incidental, a driver who sustains injuries in accident would be entitled to compensation[4].

In *New India Insurance Co. Ltd.* v. *G. Krishna Rao and others*,[5] the workman was residing in a hut provided by the employer. The hut caught fire and the workman was burnt alive in the night. It was held that fire in this case has no nexus with employment. The accommodation provided by the employer by itself cannot form basis for a claim for compensation. The employer is not liable as accident did not occur in the course of employment.

In *Divl. Personal Officer, Western Railway, Jaipur and another* v. *Ashiya Begam*,[6] Vazir Ahamad, husband of the respondent Ashiya Begam was employed as a senior cook in Running room in Railway. He suffered an accident on account of excessive gas inhaled while cooking food and died after a week. According to Railway Doctor the death of the workman was due to hyper tension. The Commissioner for Workmen's Compensation held that working on the cooking stove may not be the immediate cause of death but a situation could arise where hard working on cooking stove could lead to strain and accelerate the death. In his view the workman died in the course of employment and therefore awarded compensation. In appeal the High Court held that it is not necessary that there should be a direct connection between the cause of death and the nature of duties. Even a casual connection between the two would be sufficient to claim compensation. It is not for the courts to look into minute details but they should see whether on broad analysis of the material before the court, it can be said that the accident which resulted in injury was in the course of or out of employment. If it is accepted that the deceased was suffering from high blood-pressure from last one year, his duties as cook added strain and this strain had casual relationship with the cause of

1. (1989) 2 Lab. L.J. 135 (Raj.).
2. (1992) 1 Lab. L.J. 558 (Karn.).
3. (1995) 2 L.L.J. 231 (Madras).
4. *Oriental Insurance Co. Ltd.* v. *Nanguli Singh and another*, (1995) 1 L.L.J. 298. (Orissa)
5. (1995) 2 L.L.J. 1041 (Orissa)
6. (1994) 2 L.L.J. 795 (Raj.).

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his death. It cannot be expected that a Doctor would be able to analyse each step in order to show how the deceased developed the disease and succumbed to the same. Suddenly becoming unconscious as a result of strain is an unexpected event which can be said to be an accident leading to an injury in the course of and out of employment due to working conditions. Strenuous duties and working condition accelerated the death of the deceased and his dependants are, therefore entitled to compensation.

In *Reena Padhi and others* v. *Owners and Parties and another*,[1] Rabindranath Padhi, the husand of appellant was employed as Chief Engineer in a ship of G.E. Shipping company, the second respondent. While on duty in ship in Japan, he met with an accident and died. His wife and two children filed a suit in Admiralty jurisdiction of the High Court which refused to entertain the suit. Hence an appeal made in the Supreme Court. The Supreme Court in view of special facts and circumstances of the case ordered rupees five lakh to be paid to the appellant as compensation. But it was pointed out that this case will not be treated as a precedent for future.

In *Bai Shakri* v. *New Manekchowk Mills Company Ltd.*,[2] the deceased was employed in the weaving department of a mill. His duty hours commenced from 3 p.m. Before starting his work he had gone to see a friend in another department. There he suffered a heart attack at 3.20 p.m. and was admitted in a hospital as an indoor patient for about a month. Then he left his employment and died after sometimes. It was held that "it could not be said that the workman died as a result of the injury caused by accident arising out of and in the course of his employment". The following principles were laid down in this case :

(1) There must be a causal connection between the injury and the accident and the work done in the course of employment.

(2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

(3) It is not necessary that the workman must be actually working at the time of his death or that death must occur while he is working or had just ceased to work.

(4) Where the evidence is balanced, if the evidence shows a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed.

On a persual of the above cases the following test may be suggested to determine whether the accident has arisen out of and in the course of employment :

(1) That the workman was in fact employed on or performing the duties of his employment at the time of the accident.

(2) That the accident occurred at or about the place where he was performing his duties.

(3) That the immediate act which lead to or resulted in accident had some form of casual relation with the performance of these duties.

Notional extension of Employer's Premises.—Ordinarily a man's employment does not begin until he has reached the place where he has to work and does not continue after he has left the place of his employment. The period of going to or returning from employement are generally excluded and are within the course of employment. Travelling to and from is *prima facie* not in the course of employment.[3] But there may be reasonable extension in both the time and place and a workman may be regarded as in the course of his employment even though he had not reached or had

1. (1994) 2 L.L.J. 1045 (S.C.).
2. (1961) 1. L.L.J. 585.
3. *Newberton* v. *Coles*, 1945 A.E.R. 277.

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left his employer's premises.[1] It has been recognised time and again that the sphere of a workman's employment is not necessarily limited to the actual place where he does his work. If in going to or coming from his work he has to use an access which is part of his employer's premises, or which he is entitled to traverse because he is going to or coming from his work, he is held to be on his master's business while he is using that access.[2] The question is how far the employer is liable in case of an injury caused by accident taking place outside the normal place of employment.

This problem has been discussed by the House of Lords in *St. Helens Colliery Co. Ltd.* v. *Hewlston.*[3] In this case a workman working in a colliery was injured while travelling in a special collier's train. The railway company had by an agreement with the colliery company agreed to arrange for such a special train running between the colliery and the place of residence of the workmen. Each workman was provided with a pass and the amount of fare was deducted from his wages. It was held that the injury did not arise in the course of employment within the meaning of the English Workmen's Compensation Act, 1906 for the following reasons :

1. There was no obligation on the workmen to use the train. The workmen had a right to travel by such train but were not bound to travel by such train. They could have travelled by any other alternative means. Any workman of colliery was free to avail of the privilege or not. Had he been bound by the contract of his service to travel by such train, he would have been in the course of employment.

2. If the physical features of the locality had been such that the means of transit offered by the employer would have been the only means of transit to transport the workman to his work, there may in the workman's contract of service be implied a term that there was an obligation on the employer to provide such means and a reciprocal obligation on the workman to avail himself of them.

3. A workman in a colliery is not in the course of his employment, when he is riding in a vehicle provided by his employer unless, by the terms of his contract, he is bound to travel in that vehicle.[4]

In *Varadarajulu* v. *Masaya Boyan*[5] the employer was a contractor for the formation of a road and the deceased was a coolie mistry under him. The workman suffered injury by capsizing of the lorry belonging to the contractor and driven by his driver when the said lorry was conveying the workmen to the workspot. It was held that :

> "Where the kind of transport provided by the employer was the only means available to workmen, the accident was held to be in the course of employment because not only the lorry provided by the employer was merely a reasonable means of transport but also that there was no other means of conveyance to and from the workspot being a hilly tract."

In *Weaver* v. *Tredegar Iron Coal Co.*,[6] the appellant, a minor in the employment of the respondents worked at a pit which was near a branch railway where there was no regular station but where by an agreement between the company and Railway, facility for boarding the train was given only to the company's employees at the time of change of shifts in the colliery. On leaving the colliery one day, the appellant went to the platform in order to travel home by train, but while there, owing to rush of

1. *S.S. Mafg* v. *Bai Valu Raja*, A.I.R. 1958 S.C. 881.
2. Per Lord Macmillan in *Northumbrian Shipping Co. Ltd.* v. *Mecullum*, (1932), 48 Times L.R. 568 at 572.
3. 1924 A.C. 59 (B).
4. *M. Mackenzie* v. *I.M. Issak*, A.I.R. 1970 S.C. 1006.
5. A.I.R. 1954 Mad. 1113.
6. 1940 A.C. 955.

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workmen on the platform, he was accidentally pushed of on to the line and was injured by an approaching train. On a claim for compensation it was held that "as the appellant was making use of the platform which the respondents had arranged to be provided for their workmen coming to and leaving the colliery, and as he was upon premises which the respondents for the purposes of the employment, had obtained for him a licence to use, and on which he had no right to be except by the condition of his employment, the accident arose out of and in the course of his employment, and he was, therefore, entitled to compensation.

Works Manager, Carriage and Wagon Shop, E.I.R. v. *Mahabir*[1] is another case on this point. Mahabir, a workman of Carriage and Wagon Workshop, Alambagh, used to come from his home station Malhaur to Lucknow Station in a workmen's special train provided by the railway. From Lucknow Station he had to proceed to Alambagh workshop, about a mile away after crossing the railway line. This was a shorter route in preference to the alternative sub-way and overbridge routes available to him. On the fatal day Mahabir was coming to the railway station to catch the train after finishing his duty at 5.30 a.m. When he was just within a short distance of the station platform, he was runover by a shunting engine at 6.30 a.m. while crossing the line to reach the platform. His legs were crushed and were lateron amputated. It was held that the accident arose out of and in the course of employment within the meaning of section 3(1) of the Workmen's Compensation Act. The word 'employment' is of wider import than the word 'work' or 'duty'. The expression in the course of employment means not only the actual work which the workman is employed to do but what is incidental to it in the course of his service... It would not only the period when he is doing the work actually allotted to him but also the time when he is at a place where he would not be but for his employment.

What may be called environmental accidents, *i.e.*, accidents resulting from the surroundings in which the workman is employed or through which he has to reach his place of work in order to carry out his obligations to his employer also fall within the scope of the phrase, "arising out of and in the course of employment".

This rule is subject to the exception that where the accident occurs in public place and the risk faced by the workman is not due to his employment but to his being on the spot as a member of the public, the employer will be liable to pay a compensation only if the presence of the workman on the spot can be found traceable to an obligation imposed upon him by the employer.[2]

In *S.S. Mfg. Co.* v. *Bai Valu Raja*,[3] a workman employed in a salt works while returning home after finishing his work had to go by a public path, then through a sandy area in the open public and finally across a creek through a ferry boat. The workman, while crossing the creek in a public ferry boat which capsized due to bad weather, was drowned. It was held that on the facts of the case the accident could not be said to have arisen out of and in the course of employment while crossing the creek inasmuch as the theory of notional extension could not extend to the point where the boat capsized. When a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. The proximity of the place of accident to the place of work is irrelevant for this purpose. Even the notional extension of the place of employment terminates when the workman reaches a public road where the members of the public have a right to exercise

1. A.I.R. 1954 All. 132.
2. *Works Manager, Carriage and Wagon Shop, E.I.R.* v. *Mahabir*, A.I.R. 1954 All. 132.
3. *S.S. Mfg. Co.* v. *Bai Valu Raja*, A.I.R. 1958 S.C. 881.

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whatever right they have.[1]

In *J.F. Pareira* v. *Eastern Watch Co. Ltd.*[2] a salesman working in the company on the ground floor sought a few minutes permission to go out. Subsequently, he was found unconscious in the third floor of the building and died in hospital. It was held that while on duty a workman can be out for smoke or to visit conveniences or to enjoy a cup of tea. So long as he does not go out for his personal or on a frolic of his own, he would be deemed to be on the premises of the employer by the notional extension of the term "premises" and accident to him shall be deemed to arise in the course of employment.

In *Rajanna* v. *Union of India*,[3] a security assistant in the Special Protection Group (SPG) attached to the Cabinet Secretariat sustained injuries resulting in permanent partial disablement in a motor accident when he was travelling from staff quarters to the South Block for duty in the official SPG vehicle provided for that purpose. He claimed *ex gratia* payment in accordance with a circular of the Central Government providing for grant of *ex gratia* payment of the SPG personnel. The Central Administrative Tribunal rejected the claim on the ground that the injuries were not sustained while performing "actual VIP security duty". Hence the civil appeal by special leave was preferred. It was held by the Supreme Court that since the security assistant was travelling in the official SPG vehicle in which he was required to travel from the staff quarters to the South Block, that vehicle not being available to anyone other than the SPG personnel the security assistant was at a place or a point or an area which came within the theory of notional extension of the official premises for the performance of "actual VIP security duty". There was a causal relationship between the accident in which the security assistant sustained the injuries and his employment in the SPG for "actual VIP security duty" and it was an incident of his employment to travel from the staff quarters to the South Block in the SPG vehicle according to the official arrangement. Therefore it was held to be an accident arising out of and in the course of employment. It was further observed that the authorities concerned must adopt a humane approach and construe the circular liberally to advance its object instead of taking a rigid and pedantic stand.

In *Steel Authority of India Ltd, Rourkela Plant* v. *Kanchanbala Mohanty*,[4] one Basu Charan Mohanty, an employee met with an accident and died when he was on his way to a house under construction. His actual residence was in the opposite direction and at a far off place from the place of accident. It was held that the doctrine of notional extension applies when a person is either going to or coming from his residence to the place of work. In this case the employee adopted a route which was not normal. Residence implies some intention to remain at a place and not merely a casual visit to place. It was held that the accident occurred while the workman was on his way back from place of work to his residence by taking a different route and as such his dependants are not entitled to compensation on the basis of notional extension of employers premises. Normal route need not be the shortest route but it has to be most convenient route. Travelling a far distance in opposite direction and taking a circuitous route cannot be said to be normal route.

In *T.N.C.S Corporation Ltd.* v. *S. Poomalai*,[5] an employee was murdered in communal riot when he was on his way to the place of work. Death was held to be in relation to his employment and in the course of employment entitling the wife of the deceased workman to compensation under the Act.

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1. *Commrs. For Port of Calcutta* v. *Kaniz Fatema*, A.I.R. 1961 Cal. 310.
2. (1985) 1 L.L.J. 472 (Bom.).
3. (1995) 2 Lab L.J. 824 (S.C.).
4. (1994) 2 L.L.J. 1167 (Orissa).
5. (1995) 1 L.L.J. 378 (Madras).

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In brief the law relating to notional extension of employer's premises may be summed up as follows :

(i) There must be an obligation, express or implied, upon the employer to provide transport to and from the workspot and a reciprocal obligation upon the workman to avail that transport.

(ii) The transport facility must not only be in the nature of a concession or privilege which the workmen are free to avail or not.

(iii) Where the means of transport provided by the employer, is not only the most convenient means but also the only means to reach the place of work, there would be deemed to be an implied obligation on the employer to provide that transport and a reciprocal obligation on workman to avail it.

(iv) In the case of an accident taking place on a public road, the employer would be liable only if the employment of the workman required him to be there. The distance of the place of accident from the place of work is immaterial in such cases.

Wilful disobedience of orders or safety devices, etc.—In order to disown any claim for compensation the employer has to show not only disobedience of rules and safety devices but such disobedience must be wilful and the order must be express. The burden of proving intentional disobedience on the part of the employee would be on the employer who claims the benefit of the proviso.[1] Mere disobedience is not sufficient because it may be due to forgetfulness or the result of the impulse of the moment. The plea of wilful disobedience of the workman to any order expressly given is not available in case of death of the workman but only in cases of injury not resulting in death. Where the death of a workman was caused by an accident arising out of and in the course of employment it, is not a defence to plead that there was wilful disobedience of any order expressly given or rules framed for the purpose of securing the safety of the workman.[2]

In *Arya Muni* v. *Union of India*,[3] a workman met with an accident while working in the factory on June 5, 1954. The workman lost his right eye due to an injury caused by a spark rushing into his eye. A notice in English directing all the workers to use goggles while at work was put up on the notice board. Therefore, it was contended that the workman himself, was negligent in so far as he disobeyed the instructions by not using the goggles. Neither he ever asked for goggles nor it was supplied by the supervisor. The supervisor admitted that the goggles were in the stock but were not asked for by the workman. It was further contended that the workman understood what was in the notice. The workman stated in the evidence that he had asked for goggles but the same was not given to him. It was argued on behalf of the employer that since the appellant had stated that he knew about the goggles, it should be presumed that he knew about the instruction that had been issued and thus about the contents of the aforesaid notice. The workman was held not to be wilfully disobedient for following reasons :

(1) There is nothing to indicate that either the appellant had sufficient knowledge of Engish which could enable him to understand the contents of the aforesaid notice or that such contents were explained to him.

(2) The mere fact that he was aware in a general way of such notice which required the use of goggles by him did not mean that he had understood the precise contents of it and he knew that factory authorities had made a rule that the workman should use goggles while engaged in the discharge of their duties.

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1. *Chaitram* v. *Steel Authority of India Ltd. Bihar*, (1991) 2 Lab LLJ 144 (MP).
2. *R.B. Moondra and Co.* v. *Mst. Bhanwari*, AIR 1970 Raj 111.
3. (1965) 1 LLJ 24.

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The supervisor did not in the course of his evidence say that he asked the appellant to use goggles and inspite of his warning he had continued to work without using goggles. If the appellant was working without goggles it was the duty of the supervisor to warn him, and it was only if such an order was flouted by the workman that the respondent could claim protection under Section 3(1)(b)(ii).

The question of compensation and negligence of workman.—Contributory negligence on the part of the workman does not exonerate the master from his liability to pay compensation. While disobedience of rules and safety devices, etc., is a ground for exemption in case of injury other than death but mere negligence of a workman cannot be regarded as wilful disobedience to an order expressly given. In a case where a motor driver running with a high speed dashed with a tree and was thereby killed by accident the employer cannot escape from his liability simply because such an accident was caused by rash and negligent driving. The driver might have been in excessive speed but dashing of the vehicle with a tree cannot be said to have been brought with any previous design.[1] It was held that "an accident means some unexpected event happening without design even though there may be negligence on the part of the workman who suffers from it. Hence, once it is proved that the accident was caused in the course of employment, the question of negligence, great or small, is irrelevant."[2]

In *Ramarao Zingraji Shende* v. *Indian Yarn Manufacturing Company*,[3] Ramarao was working in the respondent company. The appellant was specifically instructed to operate the machine from the northern side but he tried to operate the machine from southern side where gear exists and was injured. Besides, the safeguard was also fitted with bolt to the machine and wokers were instructed not to remove the safety guard. According to management appellant has in disobedience of instructions removed the safety guard. It was also displayed on the notice board that before the machine is started, the worker should satisfy that safety guards are affixed and if there are no safety guards the worker should get it affixed and then start work. Inspite of the above facts it was held not to be a case of wilful disobedience. It was held that no amount of negligence in doing employment job can change the workman into unemployment job. Mere negligence cannot be regarded as wilful disobedience by the workman to an order expressly given. To decide whether an occurrence is an accident, it must be regarded from the point of view of the workman who suffers from it and if it is unexpected and without design on his part, it may be an accident. In the present case the workman met with an accident while performing his duty, though not in a diligent manner, but the fact remains that his two fingers have been crushed, still he is entitled to the compensation.

Alternative remedy under Section 3(5).—Under sub-section (5) of Section 3 no claim for compensation shall be maintainable by a workman in respect of any injury if he has already instituted a civil proceeding for damages in respect of the same injury against the employer or any other person. So also no suit for damages shall be instituted by a workman in any court of law in respect of any injury in the following two circumstances :

(1) if such workman has made a claim to compensation in respect of such injury before a Commissioner ; or

(2) if the amount of compensation in respect of the injury has been settled by an agreement between the workman and the employer in accordance with the provisions of the Act.

In case of an injury caused by an accident a workman has the following alternative remedies :

1. *Padam Debi* v. *Raghunath*, AIR 1950 Orissa 207.
2. *Ibid*.
3. (1993) 1 L.L.J. 442 (Bom).

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(i) he can claim compensation under this Act ; or

(ii) he can claim damages in torts ; or

(iii) he can claim under the Employer's Liability Act.

Section 3(5) imposes a bar on the recovery by the workman of compensation twice for the same injury. It is not only a success to a claim that bars a subsequent claim to compensation, but if a workman has brought even an unsuccessful claim against his employer he would be debarred from making any alternative claim in respect of the same injury.

The word instituted in Section 3(5) of this Act, means, "setting on foot an enquiry" and it is more than a mere filing of a claim. Where the workman has done nothing more than to file a claim and withdrew it before the proceedings actually commenced and which commencement would only be effective after giving notice to the opposite party there has been no such election as would debar the workman's dependant from seeking any other alternative claim available to him.[1] Thus, although alternative remedies are available to a workman he cannot have the best of both the worlds and put his employer in double jeopardy. The law protects the employer not only against double payment but also against double proceedings.

Claims Tribunal under the Motor Vehicles Act is not a 'Court of law' envisaged by Section 3(5) of Workmen's Compensation Act.[2]

Section 4. Amount of compensation.—(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely :—

(a) where death results from the injury	an amount equal to fifty per cent of the monthly wages of the deceased workman multiplied by the relevant factor ; or an amount of ~~fifty~~ EIGHTY thousand rupees, whichever is more ;
(b) Where permanent total disablement results from the injury	an amount equal to sixty per cent of the monthly wages of the injured workman multiplied by the relevant factor ; or an amount of ~~sixty~~ NINETY thousand rupees, whichever is more ;

Explanation I.—For the purposes of clause (a) and clause (b) "relevant factor", in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.

Explanation II.—Where the monthly wages of a workman exceed ~~two~~ FOUR thousand rupees, his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be ~~two~~ FOUR thousand rupees only.

(c) Where permanent partial disablement results from the injury	(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total

1. *S. Sappiah Chettiar v. Chinnathurai and another*, AIR 1957 Mad 216.
2. *Gyani Devi v. Jalit Ram*, AIR 1976 HP 75.

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disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury.

Explanation I.—Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

Explanation II.—In assessing the loss of earning capacity for the purposes of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I ;

(d) Where temporary disablement whether total or partial results from the injury	a half-monthly payment of the sum equivalent to twenty-five per cent of monthly wages of the workman, to be paid in accordance with the provisions of sub-section (2).

(1A) Notwithstanding anything contained in sub-section (1), while fixing the amount of compensation payable to a workman in respect of an accident occurred outside India, the Commissioner shall take into account the amount of compensation, if any, awarded to such workman in accordance with the law of country in which the accident occurred and shall reduce the amount fixed by him by the amount of compensation awarded to the workman in accordance with the law of that country ;

(2) The half-monthly payment referred to in clause (d) of sub-section (1) shall be payable on the sixteenth day—

(i) from the date of disablement where such disablement lasts for a period of twenty-eight days or more, or

(ii) after the expiry of a waiting period of three days from the date of disablement where such disablement lasts for a period of less than twenty-eight days ; and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter ;

Provided that—

(a) there shall be deducted from any lump sum or half-monthly payments to which the workman is entitled, the amount of any payment or allowance which the workman has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half monthly payment, as the case may be ; and

(b) no half-monthly payment shall in any case exceed the amount, if any, by which half the amount of the monthly wages of the workman before the accident exceeds half the amount of such wages which he is earning after the accident.

Explanation.—Any payment or allowance which the workman has received from

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the employer towards his medical treatment shall not be deemed to be a payment or allowance received by him by way of compensation within the meaning of clause (a) of the proviso.

(3) On the ceasing of the disablement before the date on which any half-monthly payment falls due there shall be payable in respect of the half-month a sum proportionate to the duration of the disablement in that half-month.

(4) If the injury of the workman results in his death, the employer shall in addition to the compensation under sub-section (1), deposit with the Commissioner a sum of ~~one~~ TWO thousand FIVE HUNDRED rupees for payment of the same to the eldest surviving dependant of the workman towards the expenditure of the funeral of such workman or where the workman did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure.

In *Mohammad Koya* v. *Balan*,[1] it was held that Section 4 of the Act is mandatory and the Commissioner can grant compensation prescribed by statute even though less compensation than what is admissible is claimed.

In *Lipton (India) Ltd.* v. *Gokul Chandra Mondal*[2] it was held that loss of vision of one eye as referred to in item No. 26 of Part II of Schedule I is not intended to apply only to total loss of vision but includes partial loss of vision also.

In *Commissioner for Workmen's Compensation* v. *P.V. Mohan and others*[3] the sole dependant of the deceased workman was his wife. She claimed compensation but before the money could be paid, she also died. Her heirs claimed compensation. It was held that the compensation amount deposited with the Commissioner had become the property of the sole dependant of the deceased workman and, therefore, after the death of that sole dependant, the said amount would devolve on the heirs of the dependant and not on the heirs of the deceased workman.

In *Management of Sree Lalithambika Enterprises, Salem* v. *S. Kailasam*[4] it was held that an accident on a holiday while cleaning machinery is accident arising out of and in the course of employment.

In *Mgt. of Tamilnadu Cement Corporation Ltd.* v. *N. Jayapalan*,[5] the respondent, a worker of the Cement Corporation sustained injuries when he was on his way to take his tool box in the factory. The disability suffered by the worker was assessed by the Doctor as permanent disability of 20%. Even after this accident the worker continued to be employed and was paid higher salary. It was held that there is nothing in the language of Section 4(1)(c)(ii) of the Workmen's Compensation Act to support the proposition that the said provision gives finality to the assessment of the Doctor in regard to loss of earning capacity. The percentage of permanent disability as fixed by the Doctor is only a proper guide to assess the damages by the Court.

It was further held that merely because the employer pays the same or more salary to the workmen even after permanent disability it cannot be said that there is no loss of earning capacity. If the law were to be so, the employer can easily evade the provisions of the Act by continuing the employment on the same terms as were enjoyed by the workman prior to the accident. Nor again can it be said that if in future the workman is compelled to seek employment at reduced wages, he can claim compensation that would result in the negation of the beneficial provisions of the Act. Further, if the management winds up its business, the workman will be in lurch because no person will give employment to a person who has suffered the injury.

1. (1987) 2 Lab LJ 86 (Kerala).
2. (1982) 1 LLJ 255 (Cal).
3. (1988) 2 Lab LJ 177 (Kerala).
4. (1988) 1 Lab LJ 63 (Madras).
5. (1994) 1 LLJ 838 (Madras).

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In *New India Assurance Co. Ltd. and another* v. *K. Abdullakutty & others*,[1] the Commissioner fixed higher percentage of loss of earning capacity than that fixed by medical officer, which was challenged before the High Court. It was held that though the disability certificate is one of the basic documents necessary to establish the disablement sustained by the workman that cannot be equated with loss of power. Loss of earning power is a question of fact which has to be judged on the basis of the nature of injuries and with due regard to the nature of the avocation of the workman at the time when he sustained the injury alongwith other attendant factors. It is not for the medical practitioner to speak of loss of earning power but it is a question to be adjudicated by the Commissioner. Loss of earning capacity is not necessarily co-extensive with the loss of physical capacity. Medical evidence though relevant, cannot be decisive. Section 4(1)(c)(ii) enables to act upon the certificate even without examining the medical practitioner and it would be open to the affected party to prove that the conclusion reached by the medical officer is vitiated. It was also held that the provisions of the Evidence Act are not made applicable to the proceedings before the Commissioner. However the principles of natural justice apply.

Causal connection between disease and occupation.—It shall be for the workman to prove that the disease is the result of the employment. Simply because the workman contracted a disease during the period of engagement does not by itself imply a causal connection between the employment and such disease. The cause contemplated is the proximate cause and not remote cause.

Application of law of pleadings.—Where in a case before the Commissioner the only contention was regarding amount of compensation, the employer could not be allowed to raise any of the points beyond the pleadings as given in the reply. Only those points which were specifically pleaded and issues were framed could be raised. No new points could be allowed to be raised at the stage of arguments.[2]

Section 4-A. Compensation to be paid when due and penalty for default.—Sub-section (1) of Section 4-A provides that the compensation shall be paid as soon as it becomes due. Sub-section (2) provides that if there is a dispute regarding amount of compensation claimed by a workman, where the employer accepts his liability but not to the extent claimed, the employer shall either provisionally pay the amount accepted by him to the workman or deposit it with the Commissioner. Any provisional payment or deposit so made by the employer shall not prejudicially affect any claim by the workman of any further amount under the Act. The workman may accept the amount as payable by the employer provisionally and make further claim for any additional amount. The employer is bound to make provisional payment of any amount based on the extent of liability he accepts within one month from the date it fell due whether in case of death or permanent or temporary disablement of any kind.

Sub-sections (3) and (3-A) which have been substituted by Amendment Act 30 of 1995 provide as follows :—

(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall—

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent. per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due ; and

(b) if, in his opinion, there is no justification for the delay, direct that the

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1. (1993) 1 LLJ 1122 (Kerala).
2. Agamnigam Mandi (P.) Sugar Mills Ltd. v. Ram Lal Jaiswal, (1985) 2 LLJ 30 (Pun).

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employer shall, in addition to the amount of the arrears, and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty :

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.—For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934.

(3-A) The interest payable under sub-section (3) shall be paid to the workman or his dependant, as the case may be, and the penalty shall be credited to the State Government.

The date of payment of compensation falling due shall be the date of accident.[1] The liability to pay interest arises as soon as the injury is caused to the workman.[2] Further, if the Commissioner considers the delay, by the employer in payment of any compensation due as unjustified, he may impose a penalty not exceeding fifty per cent of the amount of compensation due.

In *Pratap Narain Singh Deo* v. *Srinivas*,[3] it was held that it is the duty of the employer to pay compensation at the rate provided by Section 4 as soon as the personal injury is caused to the workman. Where the employer fails to do so and also makes no provisional payment under Section 4(2) but challenges the jurisdiction of the Commissioner, the employer is liable to pay interest and penalty.

In *Bai Mani* v. *Executive Engineer Irrigation Project Division Baroda*,[4] it was held that if the liability to pay compensation is even partly accepted and compensation is offered for that part then the employer would be justified in saying that maximum penalty should not be imposed. But in case of complete disclaimer of liability for compensation the employer shall be liable to pay maximum penalty of 50 per cent. That is, if a party chooses to disclaim liability knowing that they can not escape liability, it runs the risk of payment of the maximum penalty.

In *Dalip Kaur and others* v. *Northern Railway and others*,[5] it was held that even without any claim for penalty in the application, the Commissioner is bound to impose penalty if the conditions of Section 4-A (3) of the Act are satisfied. A court of law is not to go to the relief clause in the petition while granting an appropriate relief. It has to see as to what relief is to be granted to an aggrieved party.

In *Assistant Engineer (D & M) R.S.E.B.* v. *Indira Devi and another*,[6] the employer did not deposit the provisional compensation amount within 30 days as required by Section 4-A and there was no justification for the delay. It was held that when the delay in depositing the compensation was not explained the imposition of penalty being discretion cannot be interfered with by the High Court.

It was held in *National Insurance Co. Ltd.* v. *Mohd. Mujataba Khan and another*,[7] that the liability of Insurance Company cannot be more than the statutory liability and if the employer does not pay compensation the Insurance Company cannot be saddled with the liability to pay the interest.

The maximum rate of interest fixed under Section 4-A(3) is 6 per cent per annum.

1. *Superintending Engineer KEB Hubli* v. *Kadappa Mallappa*, (1984) 1 LLJ 179 (Karnataka).
2. *Madan Mohan Verma* v. *Mohan Lal*, (1983) 2 LLJ 322 (All).
3. AIR 1976 SC 222.
4. (1986) 2 LLJ 426 (Guj).
5. (1992) 1 Lab LJ 762 (P & H).
6. (1996) 1 LLJ 367 (Raj).
7. (1994) 1 LLJ 269 (AP).

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It was held in *Divisional Forest Officer and another* v. *Baijanti Bai and others*,[1] that the maximum rate of interest statutorily fixed cannot be enhanced. Therefore if the Commissioner awards higher rate of interest it would not be justified and the excess amount of interest shall be refunded to the employer.

Once the Insurance Company has agreed to indemnify the insured against his legal liability it is clear that the Insurance Company steps into the shoes of the employer mentioned in Section 4-A (3) of the Workmen's Compensation Act, 1923.[2]

Section 5. Method of Calculating Wages.—The lump sum compensation in the case of permanent disablement and half monthly payments in the case of temporary disablement is paid according to the wage group to which the workman concerned belongs. It is, therefore, essential to see how the monthly wages are determined. Monthly wages means any wages due to a workman in a month ; may be that in actual practice wages are paid by day, week, or any other period or at piece rate.

The monthly wages would be calculated as follows :

(a) Where the injured workman has been in the service of an employer during a continuous period of not less than twelve months previous to the accident the monthly wages of the workman shall be one-twelfth of the total wages which have fallen due for payment to him by the employer in the last twelve months of that period.

(b) If the injured workman has been in continuous service of an employer for less than one month, then monthly wages of that workman shall be the average monthly amount which during the twelve months immediately preceding the accident was being earned by a workman employed on the same work. If there was no such workman, the average monthly amount which was being earned by a workman employed on similar work in the same locality will be the monthly wages of the injured workman.

(c) In other cases including those in which it is not possible for want of necessary information to calculate the monthly wages under clause (b), the monthly wages shall be thirty times the total wages earned in respect of last continuous period of service immediately preceding the accident divided by the number of days comprising such period. The monthly wages of a worker is determined by multiplying the daily wage by 30.[3]

A period of service shall for the purposes of this section be deemed to be continuous which has not been interrupted by a period of absence from work exceeding fourteen days.

Section 6. Review.—Review of compensation has been provided by Section 6 of the Act. Since the nature of disablement is temporary, it is, therefore, likely that the condition of the workman may either improve or deteriorate. In either case the compensation being dependent upon the degree of disablement, it is always open to review and adjustment. Any arrangement for half monthly payment may either be arrived at by an agreement between the parties or it may be determined by the Commissioner for Workmen's Compensation. Therefore, either of two parties may make an application for review. Any such application must be supported with a certificate from a qualified medical practitioner to the effect that there has been change in the condtion of the workman. It shall be competent for the appropriate Government to frame rules laying down the cases in which any application for review may not be accompanied with a medical certificate. In accordance with the rules framed by the

1. (1995) I LLJ 837 (MP).
2. *New India Assurance Co. Ltd.* v. *Guddi & others*, (1995) I LLJ 971 (MP).
3. *Smt. Jayamma* v. *Shabir Ahmad. A. Rehman and another*, (1984) I LLJ 273 (Bom).

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Government of India an application for review need not be accompanied with a medical certificate in the following cases :—

(a) Any application by the employer on the ground that since the right to compensation was determined, the workman's wages have increased ;

(b) Any application by the workman on the ground that since the right to compensation was determined his wages have diminished ;

(c) Any application by the workman on the ground that employer having commenced to pay compensation has ceased to pay the same notwithstanding the fact that there has been no change in the workman's condition so as to warrant such cessation ;

(d) Any application either by the employer or by the workman on the ground that the determination of the rate of compensation for the time being in force was obtained by fraud or undue influence or other improper means ; and

(e) Any application either by the employer or by the workman on the ground that in the determination of compensation there is a mistake or error apparent on the face of the record.

On an application for review having been made, the Commissioner may continue, increase, decrease or end the half monthly payments. If, on such application having filed it is found that the accident has resulted in permanent disablment, the Commissioner can convert the half monthly payments into a lump sum compensation. When such conversion is allowed the amount of half monthly payments already received by the workman will be deducted from the lump sum compensation ordered to be paid. If on examining a review application filed by an employer for reduction or discontinuance of half monthly payments it appears to the Commissioner that there is reasonable ground for believing that the employer has a right to such reduction or discontinuance, he may, at any time, issue an order withholding the half monthly payments in whole or in part pending the decision on the application for review.[1]

In was held in *Rajbir Singh* v. *S.K.S. Yadav, Commissioner Workmen's Compensation*[2] that the power of review is given only in respect of compensation orders passed under Section 4(1)(d) but not in respect of orders passed under Section 4(1)(a), (b) and (c) of the Workmen's Compensation Act.

Section 7. Commutation of Payments.—Section 7 deals with commutation of half monthly payments. After the half monthly payments have been made for six months, either the employer or the workman can get the recurring payments commuted at any time to a single payment. Any such commutation can be effected either by an agreement between the parties or by an application to the Commissioner. After such commutation the right of workman to receiver half monthly payments would come to an end. On such application for commutation of half monthly payments having been made to the Commissioner, he shall estimate the probable duration of the disablement and shall then determine the lump sum amount payable on the basis of half monthly payments which will have to be paid during the estimated period.[3] From this amount shall be deducted one half per cent of the total for each month comprised in the estimated period. When the Commissioner is unable to form an approximate estimate of the probable duration of the disablement, he may from time to time postpone a decision on the application for a period not exceeding two months at any time.

Section 8. Distribution of Compensation.—(1) Section 8 of the Workmen's Compensation Act deals with the distribution of compensation amongst the dependants

1. Workmen's Compensation Rules, R. 4.
2. (1996) I LLJ 91 (Delhi).
3. Workmen's Compensation Rules, R. 5.

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of deceased workman. All payments of compensation has to be made not directly to the dependants but through the Commissioner for Workmen's Compensation. In case of deceased workman an employer may make to any dependant advances on account of compensation of an amount equal to three months' wages of such workman and so much of such amount as does exceed the compensation payable to that dependant shall be deducted by the Commissioner from such compensation and repaid to the employer.

(2) Any other sum amounting to not less than ten rupees which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.

(3) The receipt of the Commissioner shall be sufficient discharge in respect of any compensation deposited with him.

(4) The Commissioner, if he thinks necessary, may by a notice published or served individually to each of the dependants, call upon them to appear before him on a specified date for determining the distribution of the compensation. If the Commissioner after making any such enquiry which he thinks fit is satisfied that no dependants exist, he shall repay the sum of compensation to the employer by whom it was deposited after deducting any amount permissible under the Act. On a demand by the employer, the Commissioner shall furnish a statement showing details of all disbursement made by him.

The provisions of Section 8(4) leave no room for doubt that the Act was not intended to benefit any person except the workman and his dependants because it enjoins refund of the compensation to the employer in case no dependants exist.[1] Section 2(1)(d) which defines the term dependant would show that it is not intended to benefit all the heirs of a deceased workman but to embrace only those who, to some extent, depend upon him for their daily necessities.

(5) Compensation deposited in respect of a deceased workman shall after making any deduction permissible under the Act, be apportioned among the dependants of the deceased workman in such proportion as the Commissioner thinks fit. The Commissioner may in his discretion allot the entire amount of compensation to any one dependant.

(6) Where any compensation deposited with the Commissioner is payable to any person, the Commissioner shall, if the person to whom the compensation is payable is not a woman or a person under a legal disability, pay the money to person entitled thereto. In other cases, Commissioner may pay the money to the person whom he thinks entitled to it.

(7) Where any lump sum deposited with the Commissioner is payable to a woman or a person under a legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman or of such person during his disability, in such manner as the Commissioner may direct. Where a half-monthly payment is payable to any person under a legal disability, the Commissioner may of his own motion or on an application made to him in this behalf order that the payment be made during the disability to any dependant of the workman or to any other person whom the Commissioner thinks best fitted to provide for the welfare of the workman.

(8) The Commissioner is also authorised to vary his order regarding the investment or apportionment of the amount deposited with him provided he is satisfied that on account of neglect or lack of prudence on the part of the parent or on account of variation of the circumstances of any dependant or for any other sufficient cause the previous order needs such variation. Any such order can be passed only by serving notice to the parties prejudicially affected from such order. Any dependant who has been

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1. *B.M. Habeebullah* v. *Periaswami*, AIR 1977 Mad 330.

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served with a notice but did not press his or her claim cannot reopen the proceedings by a fresh application. But any such dependant who had not been a party to the previous proceedings cannot be barred from making any such application.

Proviso to sub-section (8) enjoins that no such order prejudicial to any person shall be made unless such person has been given an opportunity of showing cause why the order should not be made, or shall be made in any case in which it would involve the repayment by a dependant of any sum already paid to him.

Where the Commissioner varies any order under sub-section (8) by reason of the fact that payment of compensation to any person has been obtained by fraud, impersonation or other improper means, any amount so paid to or on behalf of such person may be recovered in the manner prescribed in Section 31 of this Act.

In *Bunnan Allauddin Khan* v. *Mohd.* alias *Mustaq Ahmad & others*,[1] the Bombay High Court held that when the dependants of a workman to whom the compensation is apportioned are majors, the Commissioner should leave to such dependants to use the money apportioned to them in any manner they liked. He cannot direct deposit of the compensation amount in National Savings Certificate in respect of major dependants though he has jurisdiction to do so in respect of minor dependants.

Rights of heirs of dependants.—On the death of a workman only such dependants who are alive at the time of death are entitled to compensation. If any such dependant dies before any claim to such compensation is made or investigated, the right passes on to his heir or legal representative as are included in the word "dependant" in Section 8.[2] On an allotment of compensation to a dependant or distribution of compensation money among several dependants, the compensation so allotted or distributed becomes the property of the dependant and if the dependant dies, the said sum being the property will devolve on his or her heirs and will not revert back to the employer.

It was held in *Samuben and others* v. *Patel Industries and another*[3] that Section 8 prohibits an employer from making any payment of compensation in respect of death of a workman directly to the heirs and legal representatives or to any of them. Employer should deposit the amount with the Commissioner. Direct payment by the employer is not deemed to be any payment. This provision is made to protect the legal representatives and heirs of the deceased workman against any kind of fraud or exploitation by or on behalf of any unscrupulous employer or any third party.

Section 9. Compensation not to be assigned, attached or charged.—Section 9 is mainly designed to give protection to a workman, who has been granted lump sum or half-monthly payment, from being deprived of the benefit of compensation. Compensation granted to a workman cannot be assigned, charged or attached by any process of law. It cannot be passed to any other person by operation of law and is also not liable to set off against any claim. An employer who has been found liable to pay compensation by way of weekly payments under the Act to a workman is not entitled to set off against those payments a sum awarded to him as costs against a workman in an application for the diminution of the weekly payments.[4]

The workman in Section 9 would mean the workman himself if he is alive and his dependant if he is not. This section rules out the passing of compensation by succession to heirs of a deceased workman who are not his dependants.[5]

Section 10. Notice and claims of the accident.—A workman who is injured by

1. (1990) 1 Lab LJ 333 (Bom).
2. *Pasupati Dutt* v. *Kelvin Jute Mills*, AIR 1937 Cal 4.
3. (1994) 2 LLJ 981 (Guj).
4. *Case* v. *Colonial Wharves*, 53 WR 514.
5. *B.M. Habeebullah* v. *Mohammad Fazal*, AIR 1977 Mad 330.

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an accident must give a notice of it in writing. This has to be done as soon as practicable after the occurrence of the accident. No hard and fast rule can be laid down in regard to what is meant by "as soon as practicable". It depends upon the individual circumstances. A notice given two months after the accident may, if the victim of accident is continuously in the hospital, be held to be one given as soon as practicable.[1] The notice must contain :—

(i) the name and address of the workman injured ;

(ii) the date of the accident ; and

(iii) the cause of the injury.

The notice has to be served upon the employer or on any one of the several employers or upon any person who is responsible to the employer for the management of the branch of trade or business where the injured workman was employed. It may be delivered to the person concerned by hand or sent by registered post addressed to the residence or any office or place of business of the person to whom it is addressed. The State Government has been empowered to direct any prescribed class of employers to maintain at their premises where workman are employed a notice book in the prescribed form. Such a notice should be readily accessible at all reasonable times to any person acting *bona fide* on behalf of the injured workman. An entry in this book would be considered to be sufficient notice of the accident to the employer.

Any claim for compensation must be made within two years of the occurrence of the accident or in case of death, within two years from the date of death.

Where the accident results in any physical or bodily injury, the date of the accident can be easily ascertained. In case of occupational diseases specified in Schedule III it would not be possible to know exactly the date on which the disease was contracted. It has, therefore, been provided that in the case of an occupational disease, the first day of the period during which the workman was continuously absent from work in consequence of the contracting of such a disease, should be considered as the date of the accident.

In case of partial disablement due to the contracting of any occupational disease which does not compel such workman to absent from duty, the period of two years for the purposes of making any claim for compensation shall be counted from the day the workman gives notice of the disablement to his employer.

Where a person, who has been in employment for a continuous period specified under Section 3(2) in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment, within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected.

The object of giving such a notice is to enable the employer to check the fact of the accident having occurred to the workman in the course of his employment and also to enable the employer to take such steps as he may think fit to mitigate the consequence in the accident.[2]

No claim for compensation shall be turned down want of defect or irregularity in the notice in the following cases :

(a) Where the claim for compensation is made in respect of the death of the workman resulting from an accident which occurred on the employer's premises or at any place under the employer's control at the time of the accident and the workman died on such premises or at place or premises belonging to employer or died without having left the vicinity of the

1. C.B.O. *Ayathurai* v. *Director*, AIR 1960 MP 313.
2. *Ahmedabad Victoria Iron Works Ltd.* v. *Maganlal Keshavlal Panchal*, AIR 1941 Bom 296.

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premises or place where the accident occurred ;

(b) Where the employer or any one of the several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time it occurred.

The Commissioner for Workmen's Compensation is empowered to condone any failure to give notice or prefer the claim if he is satisfied that the failure had been for sufficient cause. He may then proceed on to entertain and decide any claim to compensation. In justification of the power given to the Commissioner to condone any failure to give notice or prefer a claim, the Royal Commission on Labour in India had observed :

> "The dependants of a deceased workman in many cases lived hundreds of miles away from the industrial area and too often they communicated only at long intervals with workman and that on occasions they must be ignorant of his whereabouts and may not hear of his death until sometime had elapsed."

It was with a view to ensure against such difficulties that the notice of fatal accidents are to be given by the employer.

Condonation of delay.—According to Section 10(1) no claim for compensation shall be entertained by the Commissioner unless a notice of the accident is given in the prescribed manner and the claim is preferred within two years of the occurrence of the accident. The word "claim" used in Section 10(1) of the Act does not refer to a claim made to the employer but a formal claim made before the Commissioner. Such claim need not be strictly in any form prescribed by Section 22 of the Act. If there is any irregularity in the form of the application, the claim for compensation cannot be rejected.[1]

Whether a workman has made an application for compensation within the period of limitation is a question of law. The Limitation Act does not apply to proceedings under the Workmen's Compensation Act.[2] The Commissioner has discretion to condone any delay for which sufficient cause is given by the person who prefers a claim. The condonation of delay depends upon the circumstances of the case. In *Kamarhatty Co.* case,[3] Abdul Samad was an employee of the Kamarhatty Jute Mills Ltd. In 1925 he sustained injury by an accident which resulted in loss of capacity for work. His hand was caught in a machinery and the thumb and index finger were damaged. No claim to compensation was made until 3-8-1950. During this period he was working and earning higher wages. It was held that the circumstances that the workman returned to work after the accident which has caused serious injury and certain degree of permanent incapacity and began to earn higher wages is not a sufficient cause for not filing the claim for compensation within twelve months of the date of accident.[4] Under Section 10 read with the proviso if sufficient cause for not filing a claim for compensation within twelve months of the accident is established, it is immaterial if there had been subsequent negligence or improper delay in making the claim.

In another case the workman was injured during his employment and his working capacity had been reduced but had continued in his employment on lighter work on the same wages. After a few months he was asked to return to his original job for which he was incapacitated by the injury. Thereafter he was dismissed. He then applied for compensation under this Act. Although the application was made after a lapse of one year but the Commissioner was of the view that the workman had sufficient cause not

1. *Bhagwandas* v. *Pyarelal*, AIR 1954 MB 59.
2. *Salamat* v. *Agent, E.I. Railway*, AIR 1938 Cal 348.
3. *Kamarahatty Co.* v. *Abdul Samad*, AIR 1953 Cal 74.
4. *Ibid.*

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to provoke a conflict with his employer and not prefer a claim within the limitation period so long as his interests were not prejudicially affected by dismissal and so long as he was receiving a kind of compensation in the shape of lighter work on the same wages.[1]

In *Mangal Chand* v. *Forest Department, Kinnaur*,[2] the delay in filing claim for compensation had occurred because of the assurance held out by the State as well as by its subordinate limbs. The father of the deceased employee *bona fide* waited for a reasonable interval of time and then preferred a claim. It was, therefore, held that there was sufficient cause for not preferring the claim in time. Following the observations of the Supreme Court in *Trustees of Port of Bombay* v. *Premier Automobiles*,[3] the court hoped that public authorities would desist from raising pleas of delay irrespective of the margin of delay and avoid defending a claim on technical plea of delay or limitation avoiding an order on merits.

Section 10-A. Power to require from employers statement regarding fatal accidents.—Section 10-A of the Act empowers the Commissioner for Workmen's Compensation to ask for any statement regarding fatal accidents from any employer. On getting an information from any source that a workman has died as a result of accident arising out of and in the course of his employment, he may send by a registered post a notice to the employer, requiring him to submit a statement in the prescribed form. This statement is to be submitted by the employer within 30 days from the receipt of the notice. The statement will contain the following information :

(1) The circumstances attending the death of a workman ;

(2) The employer should indicate whether in his own opinion, he is liable to pay compensation on account of death.

Sub-section (2) of Section 10-A requires that if the employer accepts his liability to pay compensation, he must deposit it within thirty days of service of the notice.

If the employer disputes or disowns his liability to deposit compensation he shall in his statement submitted to the Commissioner indicate the grounds on which such disclaim may be based. Where the employer has so disclaimed his liability to pay compensation, the Commissioner shall make such inquiries as he thinks fit in that respect. After inquiry the Commissioner may inform any of the dependants of the deceased workman that it is open to them to prefer a claim for compensation. The Commissioner may furnish the defendants such other information as he thinks necessary. Under a Government notification issued under Section 20 read with Section 10-A (4), once the employer denies his liability to pay compensation, the Commissioner will have no jurisdiction to determine the compensation either to a workman or to his heirs.[4] In case of exercise of *suo-motu* power under this section the amount of compensation cannot be determined at the insurance of any party. Dependants can only be informed to prepare a claim under Section 10-A(4) of the Act.[5] An application filed under Section 10-A (1) must in this case be treated as one under Section 22 and the Compensation Commissioner has to act as a Civil Court in deciding the application. In this case interference in writ petition under Article 226 of Constitution is possible in spite of the availability of right of appeal under Section 30 of the Act.[6]

Section 10-B. Reports of fatal accidents and serious bodily injuries.—Where under the provisions of any other law in force, the employer or someone on his behalf

1. *Keshoram Cotton Mills* v. *Balgovind*, AIR 1953 Cal 1667.
2. (1985) 1 LLJ 369 (HP).
3. AIR 1974 SC 923.
4. *B.R. Roy* v. *K.T. Nonglyer*, AIR 1949 Assam 9.
5. *Mujeeb Ullah Khan* v. *Krishnan*, (1985) 2 LLJ 483 (Mad).
6. *Guru Bachan Singh* v. *State of Bihar*, 1969 Lab IC 898 (Pat).

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is required to give notice of any accident occurring on his premises which result in death or serious bodily injury, the person so required to give notice shall within seven days of such occurrence send a report to the Commissioner giving the circumstances attending death or serious bodily injury. Where the State Government has so prescribed, the person required to give notice may, instead of sending such report to the Commissioner, send it to the authority to whom he is required to give the notice. For the purposes of this section 'serious bodily injury' means an injury which involves or in all probability will involve, (i) the permanent loss of the use of, or permanent injury to any limb ; or (ii) the permanent loss of or injury to the sight or hearing ; or (iii) the fracture of any limb ; and (iv) any injury which compels the injured person to be absent from his work for a period exceeding twenty days.

The Workmen's Compensation Act does not impose a liability to give notice. Such notice may be required to be served under any other law to any authority. Section 88 of the Factories Act provides that the notice of an accident resulting in death, or such bodily injury which prevents a workman from working for a continuous period of forty-eight hours or more following the accident or in an injury of a prescribed nature, shall be given by the manager of the Factory to the Commissioner. This notice has to be given in a form prescribed by the Government stating therein :

(1) The time of accident ;
(2) Place where accident occurred ;
(3) Manner in which the deceased was employed ; and
(4) Cause of the accident.

In addition to this the following particulars of the workman should also be supplied :

(1) name ; (2) sex ; (3) age ; (4) nature of employment, and (5) postal address.

The State Government is authorised to extend the provisions regarding giving of notice to any class of premises other than those coming under the scope of sub-section (1) and also to specify the person who shall send the report to the Commissioner.

The provisions of Section 10-B of the Workmen's Compensation Act do not apply to factories to which the Employee's State Insurance Act, 1948 applies.

Section 11. Medical Examination.—A workman who is injured and has given notice of an accident to the employer shall submit himself for medical examination if offered by the employer.

Any such offer made by the employer must be free of charge and made within three days from the time at which service of the notice has been effected. So also any workman who receives half monthly payment shall submit himself for medical examination if and when required by the employer. Any workman shall be required to submit himself for examination by a medical practitioner only in accordance with the rules made under this Act and at such intervals as prescribed by these rules.

If a workman refuses to submit himself for examination by a qualified medical practitioner as required either by the employer or the Commissioner, his right to compensation shall be suspended for the period of refusal or obstruction. In these cases he will be entitled to full compensation only if he can show that he was for some sufficient cause prevented from submitting himself. If any such refusal or obstruction by the workman leads to the aggravation of injury he shall be entitled to compensation for only such disablement which would have resulted if the injury would have been properly treated. Difficulty arises where the medical treatment results in deterioration of the injury. If the intervening act is the direct or foreseeable consequence of the defendant's act then the doctrine *novus actus interveniens* does not apply, nor does it apply where the intervening actor is not fully responsible or if his act is intentionally

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procured by the plaintiff.[1]

If a workman before the expiry of the period within which he is liable under sub-section (1) to be required to submit himself for medical examination voluntarily leaves without having been so examined the vicinity of the place in which he was employed, his right to compensation shall be suspended until he returns and offers himself for such examination. Such medical examination has to take place within seventy-two hours after the workman has offered himself for medical examination.[2]

Where the workman whose right to compensation has been suspended under sub-sections (2) and (3) of Section 11, dies without having submitted himself for medical examination as required, the Commissioner may, if he thinks fit, direct the payment of compensation to the dependants of the deceased workman. But no compensation in such cases shall be payable in respect of the period of suspension and if the period of suspension commences before the expiry of the waiting period referred to in clause (d) of sub-section (1) of Section 4, the waiting period shall be increased by the period during which the suspension continues.

The aggravation of any injury shall not be taken into consideration in the assessment of compensation in the following cases under Section 11(6) :

(i) where an injured workman has refused to be attended by a qualified medical practitioner whose services have been offered to him by the employer free of charge ; or

(ii) where the injured workman has deliberately disregarded the instructions given by a qualified medical practitioner :

Provided it is proved that such refusal, disregard or failure was unreasonable in the circumstances of the case.

In such a case compensation would be paid for injury caused by accident at the original stage and any aggravation shall be ignored. Where the injury was aggravated due to the fault of the workman of ignoring medical instructions, he would suffer for it and shall not get compensation for aggravated injury.[3] Under Section 11 of the Act the onus lies upon the employer to prove that he had offered services of a medical practitioner free of charge to workman and that inspite of such offer the workman had refused to take treatment of such medical practitioner or that such treatment was taken but the workman had disregarded the instructions of such medical practitioner.[4]

The purpose of medical examination is to prevent a dishonest worker having an opportunity of concealing the nature of his injury from any impartial observer and the certificate or evidence given by the employer's doctor cannot, however be considered to be conclusive. In case the employer doubts the *bona fide* of the workman, he may get him examined by a competent medical practitioner free of cost but he cannot demand of the worker a medical certificate.[5]

Section 12. Contracting.—Under Section 12 a new liability is created whereby the employer, even though he may not be in the least, culpable, is made liable to pay his contractor's workmen where he employs a contractor for his trade or business. The employer is held vicariously liable. He can be, by sub-section (2), indemnified by his contractor. The principle underlying liability of the principal under this section seems to be that a person who employs others to advance his own business interest should be more promising and certain source of recompense to the injured workman than the intermediary who may be a man of straw more so, because such person may be in a

1. *Haynes* v. *Harwood*, (1935) 1 KB 153.
2. Workmen's Compensation Rules, R. 17.
3. *Aroth* v. *Craig Jute Mills Ltd.*, AIR 1929 Cal 481.
4. *Dorashi Ingam* v. *Harvey & Co.*, (1962) 2 LLJ 189.
5. *Superintending Engineer KEB Hubli* v. *Kadappa Malappa*, (1984) 1 LLJ 179.

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strategic position to reduce accidents by efficient organisation and supervision of his staff.[1]

In view of sub-section (3) the workman may recover the compensation from intermediary instead of employer, referred to as the principal in the section. It may very often happen that in a big scheme undertaken by a contractor, he has to let different sections of his work to petty contractors under his direction and control. Whenever an employee is working anywhere in the entire system, he will be an employee of the principal, but he may be working under a sub-contractor or a petty contractor.[2] But before the principal can be held liable it must be shown that the contractor was entitled to expect such workman to do his work at his orders and that he was entitled to dismiss such workman.

For holding the principal liable to pay compensation to any injured workman employed by the contractor, the following conditions must be fulfilled :

(1) A contract, between the principal and the contractor, who procures the services of the workman for the principal, entered in the course of or for the purposes of his trade or business.

(2) The workman must have been engaged by the contractor for doing any work which is ordinarily part of the trade or business of the principal.

(3) The amount of compensation shall be calculated with reference to the wage of the workman under the employer by whom he is immediately employed.

(4) In view of Section 12(4) the accident must not have occurred elsewhere than on, or about the premises on which the principal has undertaken, or usually undertakes to execute the work or which are otherwise under his control or management.

The workman shall have liberty to claim compensation from the contractor who employed him or from the principal, for whose trade or business he was employed by the contractor. The principal shall be indemnified by the contractor from whom the workman could have recovered compensation for the compensation paid by him. All the questions as to the right to indemnity and also amount of the indemnity shall in default of any agreement between the parties, be settled by the Commissioner.

In *Koodalingam* v. *Supdt. Engineer & others*,[3] the Public Works Department engaged a contractor for construction of canal and the contractor employed workmen to do the work. Two workmen died in landslide while at work. It was held that the Public Works Department was liable as principal to pay the compensation and was also entitled to be indemnified by the contractor. It was further pointed out that the contract between the principal and the contractor cannot affect the right of the workmen or their dependents to claim compensation from either of them at their option.

It was held in *Sarjerao Unkar Jadhav* v. *Gurinder Singh and another*,[4] that the principal employer cannot refuse to make payment of compensation to the workman on the basis of some agreement of indemnity between him and the contractor. It was further held that though the principal employer is liable for compensation under Section 12(1) he is not liable for interest and penalty.

In *Executive Engineer P.W.D.* v. *V. Subbiah Naicker*,[5] an employee engaged by a contractor of the Public Works Department met with a fatal accident while digging a plot. His father claimed compensation against the contractor and the Public Works Department. The Commissioner ordered that one-third of the compensation was payable by the contractor and two-third by the Public Works Department. The principal

1. *Port Trust, Madras* v. *Bombay Company*, AIR 1967 Mad 318.
2. *Bansidhar* v. *Ram Chandra*, AIR 1960 MP 313.
3. (1995) 1 LLJ 334 (Kerala).
4. (1992) 1 Lab LJ 156 (Bom).
5. (1983) 2 LLJ 320 (Mad).

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employer challenged the award on the ground that the contractor should have been directed to pay the entire amount. Rejecting the contention the High Court held that the Commissioner is entitled to pass an award granting compensation either in full or in part directly against the principal employer on condition that the principal employer will get indemnified by the contractor.

In *Travancore Devaswom Board* v. *Purushothoman*,[1] the Board was constituted under the Travancore-Cochin Hindu Religious Institutions Act, 1950 and the management of all incorporated and unincorporated Devaswoms and all their properties and funds vested in the Board. The Achencoil temple under the control of Devaswom Board granted licence to one 'P' to perform 'Nerchavedi'. While doing the work *vedikutti* exploded as a consequence of which Mahendra died. His dependants claimed compensation from P and also impleaded the Board as principal employer. It was held that Devaswom Board is not principal employer and is not doing any business. It is a statutory trustee constituted for the upkeep and management of temples which are intended for the spiritual upliftment of devotees. It was further held that 'Nerchavedi' is not part of the ceremonies of the temple or business of the Board, therefore, Section 12 is not attracted because neither first nor second condition is satisfied.

Trade or business of the principal.—One of the condition for holding the principal liable to pay compensation to any workman employed by the contractor, is the existence of a contract between the principal and the contractor in the course of or for the purposes of his trade or business. Where a company engaged in carrying on the business of manufacturing goods in a factory enters into a contract for the purposes of some repairs to its machinery, or the factory buildings, such contract is said to have been entered into the course of and for the purpose of the company's trade or business.[2] What is required, under Section 12 is that the work contracted must be ordinarily part of the trade or business of the principal.

In another case the sole selling agents were to take delivery of the goods from the company's mill godowns at their own expense to sell the goods at a shop which necessarily involved the transport of goods from godown to the selling agent's shop. The selling agents for transporting some bales employed a firm of which *P* was a partner. The firm hired a lorry from a lorry owner. The workman, a cleaner on the lorry was engaged by *P* to help to remove bales from the godowns and to stack them in the lorry. The cleaner was accidently killed in that operation. It was held in this case that *P* was within Section 2(e) of this Act the employer of the workman on behalf of the firm. The work that selling agents had to do included the removing of the goods from the mills' godown to the shop of the selling agents. Such work not only ordinarily formed part of the business of the selling agents, but was an essential part of it, and the selling agents could not escape liability by employing a contractor to do such work.[3]

In *Managing Director, Orissa State Warehousing Corporation* v. *Smt. Gitarani Seal & another*,[4] Mahendranath husband of Smt. Gitarani was employed by a contractor as a carpenter for execution of certain construction works of the appellant corporation. Mahendranath in the course of his employment fell down from the roof and died. The business of the appellant was to store commodities. It was held that the business of the Corporation being to store commodities, a storing place is absolutely necessary and the construction or repair of such storage place cannot be said to be not connected with the trade activities of the appellant. Therefore the carpenter was held to be employed for purposes of the employer's trade or business. The carpenter was, although employed by

1. (1989) 2 Lab LJ 114 (Kerala).
2. *New India Tennis* v. *Arora Singh*, AIR 1957 Cal 613.
3. *Kokila Bai* v. *Keshavlal Mangaldas and Company*, AIR 1942 Bom 18.
4. (1992) 1 Lab LJ 619 (Orissa).

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a contractor but the corporation was the principal employer and was as such liable to pay compensation to the workman. But the principal employer is entitled to be indemnified by the contractor.

On, in or about the premises.—The accident must have occurred either on the premises of the employer's work, or in a close proximity to such place of work. Where a workman while returning from the station after unloading rice bags, was dashed by a lorry and died, he was held to be working on, in or about the premises.[1]

Any other person.—In *Kerala Electricity Board* v. *Sundaram Estate*,[2] it was held that "any other person" in Section 12(2) could be a sub-contractor even though removed several times by the contractor, whether or not a tortfeasor, or a total stranger who is in law liable in damages for the injury caused to the workman. Sections 12(2) and 13 provides for a right of indemnification and not compensation. Indemnity under the Act is co-terminus with compensation. It cannot exceed the amount paid as compensation and no profits can be made out of the indemnity. In this case the accident occurred when the workman in the course of his employment went to do a work entrusted to him on behalf of his employer. As he came out of the Estate he stepped on a live wire attached to an electric post belonging to the Electricity Board as a result of which part of his left hand had to be amputated. The Commissioner for Workmen's Compensation ordered that the employer (contractor) was liable to pay compensation and to that extent he was entitled to be indemnified by the Electricity Board. The order of the Commissioner was upheld by the High Court. It was held that Section 12(2), as amended includes all persons contemplated under Section 13 to be proceeded against for indemnification and indemnification can be had against them by recourse to machinery provided under Section 12(2).

Section 13. Remedies of employer against stranger.—Section 13 excludes the liability determinable under Section 12. Under this section the person by whom compensation was paid and any person who has been called on to pay an indemnity under Section 12 shall be entitled to be indemnified by the person who, in the circumstances of the case, is under a legal liability to pay the damages in respect of the injury.

The section provides for cases where the workman under an employer is injured by the tortious act of a stranger. It may be that the workman is employed by a contractor or a sub-contractor under the employer. Then by virtue of Section 12 the workman may claim compensation under the Act from the principal employer. The principal employer can claim indemnity for the compensation paid from his immediate contractor. The immediate contractor is given a right to claim indemnity from his sub-contractor. But there the liability stops. If there is a sub-contractor further down, there is no provision for recourse against him even if he should be the tortfeasor. But the person who had finally been made to pay under Section 12 could claim an indemnity if he could come under Section 13. Section 13 operates only when the workman gives up his right to sue the person liable in damages and has chosen the summary remedy under the Act.[3] However Section 13 does not in so many words provide for settlement of the compensation or indemnity amount in default of agreement between parties.[4] Only the right to indemnity is declared. It seems as if the framers of the Act had in their view only the claim of a workman for consideration by the authorities under the Act. The Act is intended to provide for payment of compensation by certain classes of employees to their workmen for injury by accident. The stranger is neither an employer nor a

1. *Guru Swami Mudaliar* v. *Executive Engineer*, (1956) 2 LLJ 44.
2. (1987) 2 LLJ 311 (Ker).
3. *Kerala State Electricity Board* v. *Sundaram Estate*, (1987) 2 LLJ 311 (Ker).
4. *Trustees of the Port of Madras* v. *Bombay Company*, AIR 1967 Mad 318.

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workman. As Section 13 runs, the right against him is only preserved as counsel for defendant would have it declared.[1]

The contractor as referred to in Section 12(2) is one who contracts directly with the principal as defined in Section 12(1). It provides not only for the intermediate contractor working under the principal but also for a contractor working under the immediate contractor. If, therefore, there is any further subletting of the contract, an indemnity cannot be obtained under the Act and must be sought by recourse to the Civil Court.

In *O.F. & G. Insurance Co.* v. *Union of India*,[2] a lorry was struck by a goods train while crossing a railway gate and the driver and clearner and one of the coolies died as a result of injury by accident. The lorry was insured with the first plaintiff and it belonged to the second plaintiff. Plaintiffs claimed that the accident was a result of the negligence of the railway. A sum of money was deposited with the Workmen's Compensation Commissioner. In this case the question was about the liability of the stranger, *i.e.*, railway to pay compensation. It was held that the question as to whether a stranger is liable to indemnify the person who has deposited the compensation is not a question which is by or under the Act to be decided or dealt with by the Commissioner. Hence the contention that the jurisdiction of the Civil Court to entertain the suit is barred by Section 19(2) is without substance.

Section 14. Insolvency of employer.—(1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then in the event of the employer becoming insolvent or making a composition or scheme of arrangement with his creditors or, if the employer is a company, in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in any law for the time being in force relating to insolvency or the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so, however, that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the insolvency proceedings or liquidation.

(3) Where in any case such as is referred to in sub-section (1) the contract of the employer with the insurers is void or voidable by reason of non-compliance on the part of the employer with any terms of conditions or the contract (other than a stipulation for the payment of premiem), the provisions of that sub-section shall apply as if the contract were not void or voidable, and the insurers shall be entitled to prove in the insolvency proceedings or liquidation for the amount paid to the workman :

Provided that the provisions of this sub-section shall not apply in any case in which the workman fails to give notice to the insurers of the happening of the accident and of any resulting disablement as soon as practicable after he becomes aware of the institution of the insolvency or liquidation proceedings.

(4) There shall be deemed to be included among the debts which under Section 49 of the Presidency Towns Insolvency Act, 1909 (3 of 1909), or under Section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under Section 530 of the Companies Act, 1956 (1 of 1956), are in the distribution of the property of an insolvent or in the distribution of the assets of a company being wound up to be paid in priority to all other

1. *Trustees of the Port of Madras* v. *Bombay Company*, AIR 1967 Mad 318.
2. AIR 1975 Ori 122.

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debts, the amount due in respect of any compensation the liability wherefor accrued before the date of the order of adjudication of the insolvent or the date of the commencement of the winding up, as the case may be, and those Acts shall have effect accordingly.

(5) Where the compensation is a half-monthly payment, the amount due in respect thereof shall, for the purposes of this section, be taken to be the amount of the lump sum for which the half-monthly payment could, if redeemable, be redeemed if application were made for that purpose under Section 7, and a certificate of the Commissioner as to the amount of such sum shall be conclusive proof thereof.

(6) The provisions of sub-section (4) shall apply in the case of any amount for which an insurer is entitled to prove under Section (3), but otherwise those provisions shall not apply where the insolvent or the company being wound up has entered into such a contract with insurers as if referred to in sub-section (1).

(7) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

The Commissioner for the Workmen's Compensation has no jurisdiction to award compensation to a workman against the insurance company unless the case falls within Section 14 of the Act because the term, employer, as defined in the Act does not cover the insurance company.[1]

In *United India Insurance Company* v. *Gangadharan Nair*,[2] one *Mr. D* was employed as a driver by *M*, the employer. The insurance company entered into a contract with the insured employer to discharge liability of employer to compensate workmen. The driver met with an accident resulting in fracture for which he was awarded compensation by the Commissioner. Both the employer and the Insurance Company were impleaded as respondents before the Commissioner. The Commissioner found the insurer liable to pay the compensation since the employer insured was entitled to be indemnified. It was urged on behalf of the Insurance Company that the Commissioner has no jurisdiction to pass an award against the Company in view of Section 14 of the Workmen's Compensation Act. It was held that the provisions of Section 14 are only enabling and they do not operate as a prohibition, against any proceeding before the Commissioner involving the insurer who is liable under a contract of insurance to discharge the liability of the employer to compensate the workman according to the provisions of the Act.

Section 14-A. Compensation to be first charge on assets transferred by Employer.—Section 14-A creates a first charge as to the amount of compensation on the immovable assets transferred by the employer prior to the discharge of the liability of any compensation arising before the date of transfer. This provision has an overriding effect over any other law for the time being in force. If the liability of the insurer to the workmen is less than the liability of the employer of the workman, the workman may prove for the balance in the insolvency proceedings or liquidation. A claim thus made is however not a preferential debt.

Section 15. Special provisions relating to Masters and Seamen.—Special provision has been made in the Act in respect of masters and seamen. The notice of accident and the claim for compensation may unless the injured person is the master of the ship be served on the master of the ship. Where, however the accident occurs and the disablement commences on the ship itself, no notice of the accident need be given by the injured seaman. In case of death of master or seaman the claim for compensation shall be made within one year after the news of the claim has been received by the

1. *R.B. Moondra and Co.* v. *Mst. Bhanwari*, AIR 1970 Raj 111.
2. (1987) I LLJ 448 (Ker).

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claimant. If the ship is lost or deemed to have been lost with all the hands on the ship, the claim can be made within eighteen months of the date on which the ship was or is deemed to have been lost. The Commissioner may, however, entertain any claim even after this period if he is satisfied that there was sufficient cause for such delay. It should be noted that no half-monthly payments shall be payable in respect of the period during which the owner of the ship is liable to defray expenses of the maintenance of the injured master or seaman under any other law for the time being in force.

Under sub-section (3) of Section 15, where an injured master or seaman is discharged or left behind in any part of India or in any foreign country any depositions taken by any Judge or Magistrate or Consular Officer in a foreign country and transmitted by the person by whom they are taken to the Central or State Government shall be admissible as evidence in any proceedings for enforcing the claim, subject to the following conditions :

(1) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made ;

(2) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness ; and

(3) if the deposition was made in the course of a criminal proceeding on proof that the deposition was made in the presence of the person accused.

Further, it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition as aforesaid. A certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition, if made in a criminal proceeding was made in the prsence of the person accused, shall unless contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

No compensation shall be payable under this Act in respect of any injury in respect of which provision is made for payment of gratuity, allowance or pension under the War Pensions and Detention Allowances (Mercantile Marine, etc.) Scheme, 1939 ; or the War Pensions and Detention Allowances (Indian Seamen, etc.) Scheme, 1941, or under the Pensions (Navy, Army, Airforce and Mercantile Marine) Act, 1939 or under War Pensions and Detention Allowances (Indian Seamen) Scheme, 1942 made by the Central Government.

Failure to give a notice or make a claim or commence proceedings within the limitation time shall not be bar to the maintenance of proceedings under this Act in respect of any personal injuiy if :

(a) an application has been made for payment in respect of that injury under any of the schemes referred to in preceding clause ; and

(b) the State Government certifies that the said application was made in the reasonable belief that the injury was one in respect of which the scheme under which the application was made makes provision for payments, and that the application was rejected or that payment made in pursuance of the application were discontinued on the ground that the injury was not such an injury ; and

(c) the proceedings under this Act are commenced within one month from the date on which the said certificate of the State Government was furnished to the person commencing the proceedings.

Regarding the possibility of a homicidal death, if the choice is between death by accident and death by design, there must be presumption in favour of an accidental death.

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Section 15-A. Special provisions relating to captains and other members of

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crew of aircrafts.—This Act shall apply in the case of workmen who are captains or other members of the crew of aircrafts subject to the following modifications, namely :—

(1) The notice of the accident and the claim for compensation may, except where the person injured is the captain of the aircraft, be served on the captain of the aircraft as if he were the employer, but where the accident happened and the disablement commenced on board the aircraft, it shall not be necessary for any member of the crew to give notice of the accident.

(2) In the case of the death of the captain or other member of the crew, the claim for compensation shall be made within one year after the news of the death has been received by the claimant or, where the aircraft has been or is deemed to have been lost with all hands, within eighteen months of the date on which the aircraft was, or is deemed to have been, so lost :

Provided that the Commissioner may entertain any claim for compensation in any case notwithstanding that the claim has not been preferred in due time as provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(3) Where an injured captain or other member of the crew of the aircraft is discharged or left behind in any part of India or in any other country any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims, be admissible in evidence—

(a) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made ;

(b) if the defendant or the person accused, as the case may be, had an opportunity by himself or his agent to cross-examine the witness ;

(c) if the deposition was made in the course of a criminal proceeding,

on proof, that the deposition was made in the presence of the person accused, and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and the deposition if made in a criminal proceeding was made in the presence of the person accused shall unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

Section 15-B. Special provision relating to workmen abroad of companies and motor vehicles.—This Act shall apply—

(i) in the case of workmen who are persons recruited by companies registered in India and working as such abroad, and

(ii) persons sent for work abroad along with motor vehicles registered under the Motor Vehicles Act, 1988 as drivers, helpers, mechanics, cleaners or other workmen, subject to the following modifications, namely :—

(1) The notice of the accident and the claim for compensation may be served on the local agent of the company, or the local agent of the owner of the motor vehicle, in the country of accident, as the case may be.

(2) In the case of death of the workmen in respect of whom the provisions of this section shall apply, the claim for compensation shall be made within one year after the news of the death has been received by the claimant :

Provided that the Commissioner may entertain any claim for compensation in any case notwithstanding that the claim has not been preferred in due time as

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provided in this sub-section, if he is satisfied that the failure so to prefer the claim was due to sufficient cause.

(3) Where an injured workman is discharged or left behind in any part of India or in any other country any depositions taken by any Judge or Magistrate in that part or by any Consular Officer in the foreign country and transmitted by the person by whom they are taken to the Central Government or any State Government shall, in any proceedings for enforcing the claims be admissible in evidence—

(a) if the deposition is authenticated by the signature of the Judge, Magistrate or Consular Officer before whom it is made ;

(b) if the defendant or the person accused, as the case may be, had an opportunity, by himself or his agent to cross-examine the witness ;

(c) if the deposition was made in the course of a criminal proceeding on proof that the deposition was made in the presence of the person accused,

and it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition and a certificate by such person that the defendant or the person accused had an opportunity of cross-examining the witness and that the deposition if made in a criminal proceeding was made in the presence of the person accused shall, unless the contrary is proved, be sufficient evidence that he had that opportunity and that it was so made.

Section 16. Returns as to Compensation.—The State Government may by a notification in the official Gazette require any employer or any class of employers to submit returns with the following particulars :

(1) The number of injuries in respect of which compensation has been paid by the employer during the previous year.

(2) Amount of compensation paid during the previous year.

(3) Any other particulars relating to the compensation as the State Government may direct.

The State Government while requiring the submission of any such return shall specify particular form, time of submission and the authority to whom it will be submitted.

Section 17. Contracting out.—Section 17 of the Act aims at the protection of ignorant workman from being contracted out. Any contract, in so far as it purports to remove or reduce the liability of any person to pay compensation or whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of employment, shall be null and void. Thus this section protects any workman who may be induced by the employer to agree to a lesser amount or to abandon something which he is entitled under the Act to claim. Any contract under which a workman relinquishes his claim cannot be relied upon by the employer as a defence, because the law looks at such an agreement with disfavour and consequently such a contract is null and void.[1]

Section 18-A. Penalties.—Any employer can under Section 18-A be penalised for the following lapses :

(1) failure to maintain a notice book which he is required to maintain under sub-section (3) of Section 10 ; or

(2) failure to send to the Commissioner a statement which he is required to send under sub-section (1) of Section 10-A ; or

1. *Federation of Labour Co-operative Ltd. v. Balayan*, (1961) 1 LLJ 565.

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(3) failure to send a report which he is required to send under Section 10-B ; or

(4) failure to make a return which he is required to make under Section 16.

Any prosecution made under this section is subject to the following restrictions :

(1) Any prosecution under this section shall be instituted either by the Commissioner himself or with his previous sanction ; and

(2) The court has power to take cognizance of an offence if a complaint has been lodged within six months of the date on which the alleged commission of the offence came to the knowledge of the Commissioner.

The employer shall in such cases be punishable with fine which may extend to five thousand rupees. It means the penalty can be any amount upto rupees five thousand but not more than that. No other form of penalty can be imposed.

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CHAPTER III
COMMISSIONERS

Section 19. Reference to Commissioner.—Any Commissioner of an area concerned shall have the power to decide and settle all questions as to the liability of any person to pay compensation. In default of an agreement between the parties to arrive at a conclusion in respect of any claim to compensation, the Commissioner has jurisdiction to decide *inter alia*,—

(i) The question as to whether a person injured is a workman.

(ii) The liability of any person to pay compensation.

(iii) The amount and duration of compensation.

(iv) The nature or extent of disablement.

Section 19 provides for settlement by the Commissioner of any question regarding liability of any person to pay compensation or the amount or duration of compensation, in default of any agreement, if such question arises in any proceeding under the Act. The question does not have the effect of suspending the liability of an employer to pay compensation under Section 3 till after the settlement contemplated under Section 19.[1]

The Commissioner has jurisdiction to decide the loss of earning capacity of an injured workman. The medical evidence, being only opinion, would not be decisive of the question and that the Commissioner had independently to give a finding as to extent of the loss of the earning capacity. If with the consent of the parties, the Commissioner refers any matter for decision of the Medical Board or some other agency, it should be held that he acted *extra cursum curiae* and the parties would be bound by the opinion of the reference. None of the two parties would have a right to complain if the opinion goes against him. In such a case there would be no right to appeal. Apart from the objection to the assessment of the loss of earning capacity by the Medical Board, there is no other objection to the assessment of compensation by the Commissioner.[2] A Commissioner has no power to set aside a previous order for compensation made by him under a mistake. No addition or alteration shall be made to the judgment other than the correction of clerical or arithmetical mistake arising from an accidental slip or omission.[3]

Section 19 refers to a liability arising by vritue of this Act. The liability adjudicated upon by Claims Tribunal under the Motor Vehicles Act is a liability founded in tort and thus falls outside the scope of this section.[4]

The Commissioner acting under the Workmen's Compensation Act is a tribunal and not a civil court.[5] He constitutes an independent tribunal. His function is to judge and decide and not merely to enquire and advise and in judging and deciding the matters before him, he has to proceed judiciously and not arbitrarily.

In *Oriental Fire and Gen. Ins. Co. Ltd.* v. *Moola Singh*,[6] the compensation awarded by Motor Accidents Claims Tribunal was sought to be recovered from

1. *Pratap Narain Singh Deo* v. *Srinivas*, AIR 1976 SC 222.
2. *Swaran Ambiga Motor Service* v. *Muthuswami*, AIR 1959 Mad 559.
3. *In re* Karim Dad, AIR 1930 Lah 657.
4. *Gayatri Devi* v. *Tanti Ram*, AIR 1976 HP 75.
5. *Yeshwant Rao* v. *Sampat*, AIR 1979 MP 21.
6. (1970) Lab IC 955 (Punj).

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Insurance Company and objection to decree was raised by the Insurance Company before the Commissioner on the ground that its liability under the Act was limited to Rs. 3000/- and that it was not liable to pay Rs. 6000/-. It was held that the Insurance Company was entitled to raise objection although it was not party to decree.

In *United India Fire & General Insurance Co. Ltd.* v. *Kamalakshi*,[1] the question was whether the Commissioner for Workmen's Compensation has jurisdiction to pass an order making the insurance company liable for the amount awarded as compensation to the respondent in proceedings under the Workmen's Compensation Act. It was held that if an application is made under the Workmen's Compensation Act to the Commissioner, he has, by virtue of Section 19(1) jurisdiction to decide any question as to liability of any person to pay compensation. The insurer's liability to indemnify the insured and satisfy the judgment is covered by the "liability of person". This view is further strengthened by the provisions of Section 19(2) of this Act and Section 96(2) of the Motor Vehicles Act. The Insurance Company will be given notice of the proceedings so as to enable it to defend against the claim and the Compensation Commissioner has jurisdiction to decide the tenability of the objection and if the insurer fails, the consequential direction of the Commissioner to the insurance company is also covered under Section 19(1). In any event, in the execution of the order against insured, namely, the emplyer, the Commissioner can enforce the liability against the insurance company under Section 31.

Jurisdiction of the Civil Court.—No civil court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner. Further, the civil court has no jurisdiction to enforce any liability incurred under the Workmen's Compensation Act. Thus the jurisdiction of the civil court is expressly barred by Section 19(2) in respect of any matter that falls within the jurisdiction of the Commissioner for Workmen's Compensation. The observation of the Supreme Court in *Kanta Mills* v. *Bombay State*,[2] with regard to the scope of civil court's jurisdiction where its jurisdiction is pleaded to have been excluded expressly or impliedly are as follows :

> "In such case the court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases where the exclusion of the civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive."

In *Madina Saheb* v. *Province of Madras*,[3] the Government as a principal employer had to compensate a workman employed by contractor. Section 12(2) gives right to the Government to be indemnified by such contractor to the extent of any compensation paid by it and all questions as to right to and the amount of any such indemnity shall, in default of agreement be settled by the Commissioner. In this case, it is for the contractor to approach or apply to the Commissioner for adjudication or for the Government to claim a right to be indemnified by such contractor. It was held that :

> "It was the Government that was claiming right to be indemnified and if that right was not accepted by the contractor, then the question as to the right, had to be settled by the Commissioner..... it is for the party claiming a right to initiate proceedings for the adjudication in respect of that right. Admittedly there was no reference to the Commissioner and no decision by him of either the right to or the amount of the indemnity claimed by the Government."

1. (1980) 2 LLJ 408.
2. AIR 1965 SC 194.
3. AIR 1946 Mad 113.

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Section 19(2) of the Workmen's Compensation Act far from disentitling the contractor from obtaining any relief really disentitles the defendant Government from succeeding on any plea based upon their right to indemnity. In fact this provision leaves them without any defence whatever because they claim to withhold an amount to which the right has been declared by the Commissioner as it ought to be the case and it was disputed by the contractor.[1] Therefore, the suit by the contractor in a civil court was not barred by the provisions of Section 19(2).

Section 20. Appointment of Commissioner.—For the purposes of deciding the question of the liability of any person to pay compensation under the Act, the State Government has been authorised to appoint any person as the Commissioner for Workmen's Compensation. The appointment must be notified by the State Government in the Official Gazette. The area of jurisdiction of a Commissioner must be specified by the Government by such notification. If more than one Commissioners have been appointed for the same area, the State Government may by general or special order regulate the distribution of business between them. The Commissioner may take the assistance or the services of any person who is an expert in the matter referred to him for decision. Any such person shall assist the Commissioner in holding the inquiry. Every Commissioner shall be deemed to be a public servant within the meaning of this word under the Indian Penal Code. Now the question is how far the Commissioner shall take cognizance of any opinion expressed by the expert, whom he himself called for assistance. Where the Commissioner asked a medical expert to assist him in the adjudication, the examination by such expert took place in the presence of the Commissioner, the opposite party and the applicant's pleader, but applicant's pleader not only did not raise any objection as to the procedure, but actually acquiesced to it, it was held that the applicant could not raise any objection in appeal.[2]

Two modes are prescribed by the Act for the assessment of compensation. One is the award by the Commissioner and the other by an agreement between the parties.

In *New India Assurance Co. Ltd.* v. *Sreedharan*[3] the question for consideration related to assessment of loss of earning capacity in respect of non-scheduled injuries. It was held that under Section 20(3) the Commissioner is given discretion for the purpose of deciding any matter referred to him for decision under the Act to choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry but without adopting that mode the Commissioner cannot on his own assess the compensation on mere conjectures. The power is there with the commissioner to refer the workman to any other expert for opinion. The Commissioner can summon the Doctor when there is ambiguity in the certificate as to the loss of earning capacity and examine him. The Commissioner can very well refer the applicant to a Medical Board to examine him and report.

Section 21. Venue of proceedings and transfer.—(1) Where any matter under this Act is to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made thereunder, be done by or before the Commissioner for the area in which—

(a) the accident took place which resulted in the injury ; or

(b) the workman or in case of his death, the dependant claiming the compensation ordinarily resides ; or

(c) the employer has his registered office :

Provided that no matter shall be processed before or by a Commissioner, other

1. *Madina Saheb* v. *Province of Madras*, AIR 1946 Mad 113.
2. *A. Akbarnam* v. *Bengal Jute Co. Ltd.*, AIR 1953 Cal 697.
3. (1995) 2 LLJ 362 (Kerala).

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than the Commissioner having jurisdiction over the area in which the accident took place without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concenred :

Provided further that, where the workman, being the master of a ship or a seaman or the captain or a member of the crew of an aircraft or a workman in a motor vehicle or a company, meets with the accident outside India any such matter may be done by or before a Commissioner for the area in which the owner or agent of the ship, aircraft or motor vehicle resides or carries on business or the registered office of the company is situate, as the case may be.

(1A) If a Commissioner, other than the Commissioner with whom any money has been deposited under Section 8 proceeds with a matter under this Act the former may for the proper disposal of the matter call for transfer of any records or money remaining with the latter and on receipt of such a request, he shall comply with the same.

If in any case a Commissioner is satisfied that it can be more conveniently dealt with by other Commissioner whether in the same State or not, he may transfer such matter to such other Commissioner. Any such transfer by the Commissioner is subject to any rules made under this Act. A case may be transferred for report or disposal. When a case is transferred for report, it appears that the Commissioner is bound to dispose of the case in conformity with the report received. When a case is transferred for disposal, the Commissioner is required to send the complete record of the case together with all sums in his hand, or invested by him for the benefit of any party to the proceedings.

If any party to the proceedings has appeared before him, the Commissioner shall not make any order of transfer relating to the distribution among dependants of the lump sum without giving such party an opportunity of being heard.

Any Commissioner to whom any matter is transferred for report shall subject to the rules made under this Act, inquire into it and send his report thereto. But if the matter was transferred for disposal, he may continue the proceedings in the same manner as if it would have originally commenced before him. On receipt of the report from the transferee Commissioner, the Commissioner who transferred it shall decide the matter in conformity with the report. Further, the State Government may also transfer any matter from any Commissioner appointed by it to any other Commissioner appointed by it. It means the State Government cannot on its own accord transfer a proceeding from a Commissioner appointed by it to a Commissioner appointed by another State Government or *vice versa*.

In *Ramat Massy* v. *Arvind Construction Company (P.) Ltd., and another*,[1] the respondent company having its head office at Delhi, entered into a contract at Delhi for construction to be performed in Iraq. The parties had not agreed that the Iraqi courts will have jurisdiction. Under this contract a Mechanic-Helper was sent to Iraq where he died and compensation was claimed under the Act. It was held that Section 21 only speaks of territorial jurisdiction for the purpose of territorial division under the Workmen's Compensation Act and it does not indicate as to whether the Commissioner under the Act can at all entertain a petition when the alleged accident had taken place outside India. It was further held that since the contract is silent about the remedy in courts of a particular country to have exclusive jurisdiction, the Indian Courts will have the jurisdiction to entertain and decide the question of compensation.

Section 22. Form of Application.—An application under any statute can be made in accordance with its provisions provided a right to an application is given by

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[1] (1989) 2 L.L.J. 397 (Delhi).

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such statute. The right under the Workmen's Compensation Act is not something like the common law right to damages. It is a creature of the Act itself and can be claimed only in the manner and to the extent, the Act prescribes and permits.[1]

Sub-section (1) of Section 22 provides that where an accident occurs in respect of which liability to pay compensation under this Act arises, a claim for such compensation may, subject to the provisions of this Act, be made before the Commissioner.

Sub-section (1-A) provides that subject to the provisions of sub-section (1) no application for the settlement of any matter by a Commissioner, other than an application by a dependant or dependants for compensation shall be *deemed* unless and until some question has arisen between the parties in connection therewith which they have been unable to settle by agreement.

Any application shall be made to the Commissioner in the form prescribed by the Act. It must also be accompanied with the prescribed fee and contain the following particulars :

(1) A concise statement of the circumstances in which the application is made and the relief or order which the applicant claims ;

(2) In case of a claim for compensation against an employer, the date of service of notice of the accident on the employer and, if such notice has not been served in due time, reason for such omission ;

(3) The names and addresses of the parties ; and

(4) Except in case of application by dependants for compensation—

(i) a concise statement of the matters on which agreement has been reached, and

(ii) a concise statement of those matters on which agreement has not been come to.

Section 22(3) provides that if the applicant is illiterate or for any other reasons is unable to furnish the required information in writing, he can take necessary directions from the Commissioner for preferring his claim. The application, if the applicant so desires, may be prepared under the direction of the Commissioner.

Sub-section (1) of Section 22 has on many occasions been considered by the Courts and it has been laid down that a prior attempt to arrive at a settlement out of court was not a condition precedent to the filing of an application before the Commissioner.[2] The words "in default of an agreement" used in Section 19 do not lay down a condition precedent to approach the Commissioner and that such a step was not strictly needed to invest the Commissioner with jurisdiction to try the case.[3] The provision of Section 22 does not mean that before the Commissioner can assume jurisdiction there must be some attempt to agree which had proved unsuccessful but it means "if not settled by agreement".[4]

An application under Section 22 may be sent to the Commissioner by registered post or may be presented to him or to any of his subordinate authorised by him in this behalf and if so sent or presented shall, unless the Commissioner otherwise directs, be made in duplicate in the appropriate form and shall be signed by the applicant.[5] There shall also be appended to every such application a certificate which shall be signed by the applicant to the effect that the statement of facts contained in the application is to the best of his knowledge and belief accurate.[6]

1. *Angus Co. Ltd.* v. *Chouthi*, AIR 1955 Cal 615.
2. *G.E. Corporation* v. *Dorai Raj*, AIR 1960 Orissa 39.
3. *Makhanlal* v. *Audh Behari*, AIR 1959 All 586.
4. *Fakiragram Rice Mills* v. *Ramu Indu*, AIR 1950 Assam 188.
5. Workmen's Compensation Rules, R. 20.
6. Workmen's Compensation Rules, R. 20.

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Liability of insurer.—In *Bibhuti Bhusan Mukherjee* v. *Smt. Dinamani Dei*,[1] it was held that although the primary liability to compensate was that of the employer, yet the insurance company was also liable to discharge the claim if it was a judgment-debtor.

In *United India Insurance Company Ltd.* v. *Vasudevan*,[2] it was held that the Commissioner has jurisdiction to determine the liability of any person to pay compensation, and such jurisdiction is not limited by the provisions contained in Section 14 of the Workmen's Compensation Act. The provisions of the Motor Vehicles Act are to be read into the provisions of the Workmen's Compensation Act when the question arises as to the liability of the Insurer to indemnify the insured and satisfy the claim of the persons entitled to get the benefit of the adjudication. Therefore, in proceedings under Section 22 of the Workmen's Compensation Act, the Commissioner is empowered to direct the insurer to pay the compensation as provided for even in cases where Section 14 of the Act has no application.

Defective application.—An application which has not been made on a proper form or is otherwise defective shall not be rejected only on the ground that the claim had not been made on a proper form. This is a defect of procedure which can be rectified with the permission of the Commissiner at any stage, and once it is rectified, the irregularity is cured.[3]

Section 22-A. Power of the Commissioner to require further deposit in cases of fatal accidents.—Under Section 22-A the Commissioner is authorised to call for additional amount as deposit in case of fatal accidents. The employer under Section 10-A is required to deposit compensation payable to dependants in case of fatal accidents. Under Section 8 of the Act the dependants of a deceased workman are authorised to make an application for deposit of compensation. Therefore, in case of any injury resulting in death where any sum has been deposited by the employer as compensation payable to workman and the Commissioner is of the opinion that the sum so deposited is insufficient he may serve a notice in writing upon the employer to show cause why should he not deposit a further sum. The employer may be required to deposit this further sum within the time stated in the notice. The Commissioner should also communicate in his notice to the employer the reasons that compelled him to ask for such further deposit.

The employer can prefer an objection against any such notice served upon him by the Commissionser. If the employer does not prefer objections or fails to show cause to the satisfaction of the Commissioner, the Commissioner may make an award determining the total amount payable and requiring the employer to make good the deficiency.

Section 23. Powers and Procedure of Commissioners.—The Commissioner, is authorised by Section 23 of the Act to exercise powers under the Civil Procedure Code, 1908, for the following purposes :

(1) For the purposes of taking evidence on oath,

(2) For enforcing the attendance of witnesses, and

(3) For compelling the production of documents and material objects.

The Commissioner is deemed to be a Civil Court for purposes of Section 195 and of Chapter XXVI of Criminal Procedure Code, 1973. The Commissioner may vary the procedure prescribed by the rules and orders as may be necessary or proper to adopt them in the matter before him. He may also ignore such rules of procedure provided he is satisfied that the interest of the parties will not thereby be prejudicially affected.

1. (1982) 1 LLJ 73 (Orissa) : *See* also *Premier Insurance Company Ltd.* v. *C. Thomas*, (1984) 1 LLJ 149 (Mad).
2. (1989) 2 Lab LJ 220 (Kerala).
3. *B.M. & O. Engineering Factory* v. *Bahadur Singh*, AIR 1955 All 1982.

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The effect of Section 23 is that only certain provisions of Civil Procedure Code and not others have been made applicable to proceedings under the Act. Order 22 of the C.P. Code which deals with legal representation in cases where parties to proceeding die is conspicuous by its absence from Rule 14 and lends further strength to the conclusion that such representation is not contemplated in cases falling under the Compensation Act.[1]

A Commissioner acting under the Act has no jurisdiction or power to issue a commission to examine a witness and the answers given by the witness to interogatories furnished to him cannot be received as legal evidence, more particularly so, when the answers are not recorded before any court or any officer examining the witness on commission and are not given on oath.[2] Although it is not obligatory but the Commissioner may, if he thinks it necessary, hold a preliminary inquiry and if he feels that there is no case of the relief claimed he may dismiss the application with a brief statement of his reasons for so doing.[3]

Where an application for compensation was dismissed in default and later on restored after showing good cause the applicant was entitled to cross-examine the witness examined by the opposite party in his absence. The Commissioner's order that the applicant was entitled to take part in the proceedings only from the point at which the application for restoration was allowed was held to be wrong.[4]

Section 24. Appearance of Parties.—Section 24 lays down as to who can appear for the parties in the proceedings before the Commissioner under the Act. Parties to a claim can be represented through :

(1) a legal practitioner, or
(2) an official of an insurance company, or
(3) an official of a registered Trade Union, or
(4) an inspector appointed under Section 8 of the Factories Act, or
(5) an officer appointed under Section 5 of the Mines Act, or
(6) an officer specified by the State Government in this behalf provided that the authorisation is in writing, or
(7) with the permission of the Commissioner any other person so authorised.

Where any party to a proceeding is under the age of 15 years or is unable to make an appearance, the Commissioner shall appoint some suitable person who consents to the appointment to represent such party for the purposes of the proceedings.[5] If the Commissioner considers that the interest of any party for whom a representative has been appointed under Rule 45 are not being adequately protected by the representative or if a person appointed to act as a representative dies or becomes incapable of acting, or otherwise ceases to act as such, the Commissioner shall appoint in his place another person who consents to the appointment.[6]

Section 24 authorises a Trade Union to submit an application on behalf of the injured workman. Therefore in a case where the application was submitted by the Secretary, Mazdoor Congress, Indore on behalf of the injured workman, it was held to be in order, although it did not bear the signature of the workman.[7] So also an application by the managing member of a joint Hindu family on behalf of the widow

1. *B.M. Habibulla* v. *Periaswami*, AIR 1977 Mad 330.
2. *Singh* v. *Burma Railways*, AIR 1939 Rang 70.
3. Workmen's Compensation Rules, R. 25.
4. *Shaikh Amir* v. *Jardarbeg*, 1970 Lab IC 1956.
5. Workmen's Compensation Rules, R. 46.
6. Ibid, Rule 47.
7. *Bhagwandas* v. *Pyare Lal*, AIR 1954 MB 59.

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and the minors was held to be in order in *Messrs. Nanak Chand Shadi Ram* v. *Mahabir.*[1]

Section 25. Method of Recording Evidence.—It shall not be obligatory upon the Commissioner to record any evidence word by word unless it is the evidence of any medical witness. The evidence has to be recorded either by the Commissioner himself or by any other person under his dictation. It should also be signed by the Commissioner and shall form part of the record. If for certain reasons recorded in writing the Commissioner is unable to record the memorandum of evidence he shall cause any other person to record it under his dictation and shall also sign the same. The evidence of any medical witness shall be recorded as nearly as may be word by word.

The Commissioner should not make the medical certificate the basis of his award without examining the medical officer who issued it.[2] The medical certificates are not of themselves admissible in evidence. If either of the two parties desire to put medical testimony, they must do so by calling medical witnesses.

Section 26. Cost.—Section 26 provides that all costs incidental to any proceedings before a Commissioner shall subject to the rules made under this Act be in the discretion of the Commissioner. Thus, the Act leaves the question of awarding cost to the absolute discretion of the Commissioner, but the discretion shall always be judicial. If the Commissioner is satisfied that the applicant is unable by reason of poverty to pay the prescribed fees he may remit any or all such fees. If the case is decided in favour of the applicant, the prescribed fees, which had they not been remitted would have become due to be paid, may be added to the costs of the case and recovered in such manner as the Commissioner in his order regarding cost may direct. A successful defendant has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff, but he has no right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them.[3]

Section 27. Power to submit cases.—Section 27 of the Act authorises the Commissioner to submit any question of law for the decision of the High Court. On any such reference having been made the High Court shall decide the matter and communicate its decision to the Commissioner who submitted it. Thereafter the Commissioner shall decide the matter in conformity with the decision of the High Court. By the use of this provision the Commissioner may be enable to avoid an appeal and consequent expenses to the parties.

Section 28. Registration of agreements.—Section 28 requires certain agreements arrived at between the workman and the employer with respect to payment of compensation, to be registered before the Commissioner. Under sub-section (1) the following agreement should be registered :

(1) Where the amount of any lump sum payable as compensation has been settled by an agreement whether by way of redemption of a half monthly payment or otherwise ; or

(2) Where a compensation has been settled and is payable to a woman or a person under a legal disability.

The memorandum of agreement has to be submitted to the Commissioner for registration. If the Commissioner is satisfied that the memorandum so received is genuine, it shall be recorded and registered.

The Commissioner may in the following cases refuse to register any memorandum if he is of the opinion that :

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1. AIR 1935 All 408.
2. *M.S.M. Co. Ltd.* v. *Mohd. Kunju*, AIR 1936 Trav. Co. 55.
3. *Donald Campbell & Co.* v. *Pollak*, (1972) AC 732 at p 811.

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(i) the sum arrived at by agreement is inadequate ; or

(ii) the agreement has been obtained by fraud, undue influence or improper means.

In refusing to register an agreement the Commissioner has to act judiciously. If the Commissioner feels inclined to refuse the registration of the memorandum of agreement, he is bound to state his reason.[1]

In such cases he may make an order for payment of any sum as he thinks just in the circumstances. The Commissioner may at any time rectify the register. No memorandum shall be recorded by the Commissioner before seven days after communication by the Commissioner of notice to the parties concerned.

An agreement for the payment of compensation which has been registered by the Commissioner shall be enforceable under this Act, notwithstanding anything contained in the Indian Contract Act, 1872, or any other law for the time being in force. The Commissioner has no jurisdiction to bye-pass the specific procedure advisedly laid down by the legislature in Section 28 of the Act and the rules made under the Act.[2]

In *Managing Director, O.R.T. Co. Ltd.* v. *S. Rama Mohan Rao*,[3] it was held that if there is a valid agreement, Commissioner has no power to give judgment ignoring the agreement. He cannot embark on the merits of the case if the agreement is genuine. Non-consideration of the agreement is an error of law which vitiated the decision.

In *Nagapttinam Import and Export Corporation* v. *K. Lakshmi*,[4] one Karuna Vijayan met with a fatal accident in 1973 and his wife was given a sum in full settlement by the employer but it was not registered under Section 28. His wife filed a belated claim in 1981 before the Commissioner. The Commissioner awarded a sum of Rs. 16800 and the employer preferred an appeal to the High Court. It was held that unless a receipt of compensation is registered under Section 28 it cannot be used as an answer to the claim. Unless such a reasonable interpretation is given to Section 28, the employer would offer a paltry sum to the dependant of the deceased who might be in dire need and get a receipt in full settlement of claim and thwart the object of the Act. As for delay is concerned, since the lower authority has considered the reasons and condoned the delay, there is nothing to interfere with that decision.

Section 29. Effect of failure to register agreement.—If the memorandum of an agreement which is required to be registered is not sent to the Commissioner for that purpose, the employer shall be liable to pay full amount of compensation, which he under the Act may be liable to pay. Furthermore the employer shall not be entitled to deduct more than half of any amount so paid to the workman by way of compensation whether under the agreement or otherwise. The Commissioner for Workmen's Compensation is authorised to direct any deduction in addition to the above amount, but the employer cannot claim it, as a matter of right. Thus, the effect of non-submission of memorandum of agreement for registration is that the liability of employer to pay compensation remains in fact. Where a memorandum of agreement has not been registered the employer is not entitled to get a set off for any sum paid as compensation.[5]

Section 30. Appeals.—Section 30 of the Workmen's Compensation Act deals with the right of appeal. It provides a right of appeal to the High Court from the order of the Commissioner. Only restricted right of appeal has been granted by this section. No appeal shall lie against any order of the Commissioner unless the following

1. *Jiyaji Rao Cotton Mills Ltd.* v. *Asharfilal Nandlal*, AIR 1955 NUC (MB) 1916.
2. *Amarshi Jeram* v. *Hazrat & Co.* (1961) 2 LLJ 187.
3. (1988) 1 Lab LJ 200 (Orissa).
4. (1993) 1 LLJ 873 (Madras).
5. *Mrs. Khathleen Dias* v. *H.M. Coria & Sons*, 3 FJR 304.

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conditions are fulfilled :

(1) A substantial question of law is involved in the appeal.

(2) Except an order refusing to allow redemption of a half-monthly payment, the amount in dispute in appeal is not less than Rupees three hundred.

(3) The parties have not agreed to abide by the decision of Commissioner.

(4) Order of the Commissioner does not give effect to an agreement arrived at between the parties.

(5) In case of an appeal against an order awarding compensation in lump sum, the memorandum of appeal must be accompanied with a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against. This provision is mandatory and not merely declaratory.[1] The presentation of appeal without certificate is not competent.[2]

(6) Appeal is filed within the limitation period of sixty days from the date of the order. Limitation would begin from the date the party is informed of the order.[3]

It is also provided that an appeal shall lie from the following orders of the Commissioner :

(1) An order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum ;

(2) an order awarding interest or penalty under Section 4-A ;

(3) an order refusing to allow redemption of a half-monthly payment ;

(4) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant ;

(5) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of Section 12 ; or

(6) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions.

The provisions of Section 5 of the Limitation Act, 1963 shall be applicable to appeals under this section.

In *Oriental Insurance Company Ltd.* v. *Shri Anil Chandra Das and others*,[4] the Commisioner while deciding a case of permanent disablement did not consider the medical report *vis-a-vis* Schedule I of the Act and no opportunity was given to the parties to adduce evidence. Compensation was not deposited by Insurance Company. As the impugned judgment was passed in complete disregard of principles of natural justice and in violation of the Act, the judgment was held as *non-est* in the eye of law and the question of payment as per Section 30 could not arise. Therefore the appeal could not be dismissed for non-compliance with Section 30.

Substantial Question of Law—It would not be sufficient that there should be involved only a question of law, but what is required under the provisions is a substantial question of law. The emphasis seems to be on the word 'substantial'. In view of the Allahabad High Court the phrase must be given a wider construction than what is attributed to it under Section 110 of the Civil Procedure Code, namely that it would not cover cases of application of well settled principles of law to a particular set of facts.[5] It should, therefore, be construed to cover even a case in which the Commissioner

1. *Bihar Journals* v. *Vatiya Nand*, AIR 1959 Pat 112.
2. *C.E. Corporation* v. *Dorai Raj*, AIR 1960 Orissa 39.
3. *Harishanker Narayanji* v. *K. Sadashiv*, AIR 1956 Nag 144.
4. (1996) I LLJ 1123 (Gau.).
5. *Jwali* v. *Babulal*, AIR 1958 All 564.

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has clearly misdirected himself on a question of law such as he awards compensation without having a notice of the proceedings served on employer.[1] A substantial question of law is that which, by reason of the question being unsettled or by reason of there being a conflict of existing authority as to the principle of law involved, requires an authoritative interpretation by the highest court of the land.

In *Kai Khushro Ghiara* v. *C.P. Syndicate Ltd.*,[2] Chief justice Mr. Chhagla observed that : "A substantial question is not necessarily a question which is of public importance. It must be a substantial question of law as between the parties in the case involved.....what is contemplated is not a question of law alone ; it must be a substantial question. One can define it negatively. For instance, if there is well established principle of law and the principle of law is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest court".

Thus a question of law can be said to be a substantial question of law if there is some doubt or difference of opinion. In *M.L. Burman* v. *Shyam Sunder*,[3] it was held that : "where the question is whether a person is a 'workman' within the meaning of the Act, upon the finding of the nature of the work done by him, it being an inference from the facts established it is a question of law within the meaning of the first proviso to Section 30(1) and an appeal lies against the decision of the Authority under Section 15 that the person is a workman. The question, as to whether the employee was engaged in clerical capacity or not as required by clause (ii) of Schedule II so as to entitle him for the compensation, must be deemed to be a substantial question of law, as the conclusions on facts found would govern other employees also similarly situated".

In *Managing Director, O.R.T. Co. Ltd.* v. *S. Rama Mohan Rao*[4] it was held that whether a workman is totally disabled is a question of fact and when this question of fact is not supported by any material it would be a surmise and thus a question of law under first proviso to Section 30(1). Similarly where material piece of evidence has not been taken into consideration which if considered, would negative the finding of fact, a question of law would arise.

It was held in *Raveendran* v. *Somavally*[5] that where on particular point there is evidence for and against and a finding is recorded by the Commossioner, on taking a particular view of the evidence it cannot be questioned even though it is erroneous. Only in cases where the Commissioner has clearly misdirected himself on a question of law or a finding is recorded without any evidence whatsoever or a perverse finding is reached which no reasonable man would reach, it can be said that a substantial question of law has arisen. It was further held that the question as to whether or not the workman was at the time of accident employed by the employer and whether or not the accident resulting in injury took place during the course of employment are all questions of fact on which no appeal lies under Section 30 of the Act.

It was observed in *Depot Manager, A.P.S.R.T.C., Nirmal* v. *Abdul Sattar*[6] that the employee had not stated anything in his application as regards the alleged accident or injury and he had come forward in his evidence with a new date as to the occurrence

1. *Upper Ganges Electric Employees Union* v. *Upper Ganges Valley Electricity Supply Co. Ltd.*, AIR 1956 All 491.
2. AIR 1949 Bom 134.
3. AIR 1969 Pat 366.
4. (1988) 1 Lab LJ 200 (Orissa).
5. (1996) 1 LLJ 325 (Kerala).
6. (1995) 2 LLJ 318 (AP).

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of the alleged accident and that he has not raised any claim for more than 8 years and presented the application without any explanation whatsoever for the delay. He had not stated in his evidence that he had suffered any injury to his eyes on Feb. 14, 1978 or at any time prior to his retirement on July 4, 1979 or that he lost his eye-sight because of that. There is no material to show that engine or diesel oil affects the eyes and renders one blind. Consequently, it was held that the finding of the Commissioner as regards the alleged accident and the connection between the accident and the loss of eye-sight by the employee are not supported by an evidence on record or reason or logic and are based merely on conjectures and surmises. In the light of the above no case for compensation was held to have been established. It was further held that a finding based on no evidence and a finding which is perverse gives rise to a question of law warranting interference under Section 30(1) of the Act.

Can Courts intervene on questions of fact.—The Courts are precluded from interfering with a finding of fact by the Commissioner unless it is so incorrect, so opposed to the evidence or so perverse as to be brought into the category of a question of law,[1] or are influenced by irrelevant considerations.[2] The intention of the legislature appears to be that the question of finding of fact by the Commissioner should not be challenged, therefore the power of the Courts is limited to interfere in such finding of fact as may be necessary for the determination of law involved.[3] In a case where the Commissioner had observed that there was no evidence on which he could base a finding that the accident occurred out of the employment, the Bombay High Court observed that : "Whether his finding is right is a question of law which this court can determine".[4] The fact arrived at by the Commissioner can in certain circumstances be examined by the Courts. In a case the Commissioner decided that although it was a case of suicide, the suicide was due to temporary insanity or some kind of insanity and mental depression and that arose out of and in the course of employment. Commenting upon these findings of the Commissioner the High Court of Calcutta said :

> "Normally this would be a question of fact with which this court will ordinarily be disinclined to interfere. Here it is not so much a question of fact but inference by the learned Commissioner for Workmen's Compensation which we find impossible to support on the fact of this case. Indeed it is more a conjecture by the Commissioner than an inference. The distinction between inference and conjecture is that an inference rests upon premises of fact, a conjecture does not."[5]

Where there is no evidence or finding of fact is contrary to evidence or where the evidence is so megre that no reasonable man would on the basis of such evidence come to a positive finding, it is substantially a mixed question of fact and law. Non-consideration of material circumstances gives rise to a substantial question of law, entitling High Court to go into the merits of the dispute.[6]

When an appeal lies.—An appeal from the order of the Commissioner lies when some substantial question of law is involved which requires adjudication by the highest court. When the Commissioner after condoning the delay in making the claim rejects a claim for compensation on the ground of limitation under Section 10(1), without giving any decision on the merits, the order was held to be illegal and an appeal under Section 30 shall lie to the High Court.[7] Where a substantial question of law arises, the High

1. *P.C. Abdulla Kutty* v. *Janki*, AIR 1953 Mad 837.
2. *M/s. Chowgule & Co. (Pvt.) Ltd.* v. *Smt. Felicidade*, AIR 1970 Goa 127.
3. *Cooling Equipment Co.* v. *Zainab Bibi*, AIR 1943 Lah 279.
4. *Vishram Yeshu* v. *Dadabhoy Hormasji & Co.*, AIR 1942 Bom 175.
5. *Mackinnon Mackenzie & Co. Ltd.* v. *Miss Velma Williams*, AIR 1964 Cal 24.
6. *Steel Authority of India Ltd., Rourkela Plant* v. *Kanchanbala Mohanty*, (1994) 2 LLJ 1167 (Orissa).
7. AIR 1942 Mad 116.

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Court is entitled to consider the case as a whole on point of fact as well as on point of law.[1] When the Commissioner after weighing all the material available to him came to the conclusion that the version put forward by the employer was wholly impossible and not credit-worthy, even though the employer's witness had given a cogent and consistent version and that version was supported by the dying declaration of the deceased and was not inconsistent with the medical evidence in regard to the injuries, he was entirely within his province in doing so and there is no perversity or gross misappropriation of evidence in such a conclusion being arrived at.[2]

It was held in *M/s. Kap Steel Ltd.* v. *Smt. R. Sasikala*,[3] that in the absence of any provision in the workmen's compensation Act or under the rules imposing a duty to communicate the order passed by the Commissioner, the time for making appeal should be counted from the date of pronouncement of the order of the Commissioner and not from the date of communication of the order even if such a communication was made. Depositing of the amount of interest or penalty imposed under Section 4-A of the Act in addition to the amount of compensation awarded or otherwise is not a condition for preferring an appeal under Section 30(1) of the Act.

Effect of death of claimant.—It was held in *Proprietor, Radhakrishna Estate* v. *Smt. Mary*,[4] that the right of compensation claimed by the workman, is transmitted to his heirs, on his death. There is no provision for dismissal of application on the ground of death of the workman making the claim. The case is to be continued to reach its legitimate conclusion.

Third proviso to Section 30(1)

It was held in *United India Insurance Co. Ltd.* v. *Shaik Alimuddin and another*,[5] that it would be enough if the insurance company deposits the amount of compensation awarded, at the time of filing of the appeal. The Insurance Company is not liable to deposit the penalty and interest also at the time of filing the appeal.

It was held in *United India Insurance Co. Ltd.* v. *Kashimsab and others*,[6] that in view of proviso to Section 30(1) of the Workmen's Compensation Act, 1923 when an appeal is filed by the insurer challenging the award of compensation in favour of the workman, the appeal cannot be entertained unless it is accompanied with a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against otherwise the very object of the proviso would be defeated.

It was held in *Oriental Insurance Co. Ltd.* v. *Raju and others*,[7] that having regard to the first proviso to Section 30(1) of the Workmen's Compensation Act, 1923 the question raised relating to imposition of interest on compensation determined is a substantial question of law. It was also held that Insurance Company is not liable to pay interest on the amount of compensation awarded.

Review, Revision, Remand and Writ.—The Commissioner under the Act has power to review as provided under Section 47 of the Civil Procedure Code.[8] According to Assam High Court, Commissioner is a court subordinate to the High Court and is

1. *Gaurikerikar Bhakat* v. *Radhakishan Mill*, AIR 1933 Cal 220.
2. *Shathamallappa* v. *Chandappa*, AIR 1958 Mysore 116.
3. (1992) 1 Lab LJ 61 (Karn).
4. (1995) 1 LLJ 695 (Karn).
5. (1995) 1 LLJ 488 (AP).
6. (1994) 1 LLJ 500 (Karn) ; *See* also *United India Insurance Co. Ltd.* v. *Ghulam Qadir Dar and others*, (1993) 2 LLJ 9 (J & K).
7. (1994) 2 LLJ 1038 (Karn).
8. *Nandkishor* v. *Bhikaree*, AIR 1939 All 408.

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subject to the revisional jurisdiction of High Court.[1] But according to Madhya Pradesh High Court in *Yashwant Rao* v. *Sampat*,[2] Commissioner is a Tribunal and his order is not revisable by the High Court under Section 115 of the C.P. Code. It would be open to the appellate court to order remand of the case to the Commissioner.[3] Where there has been flagrant abuse of power or non-exercise of jurisdiction or an error apparent on the face of the record and when no appeal lies, the order can be challenged by a writ.[4] In *Guru Bachan Singh* v. *State of Bihar*,[5] the employer denied his liability to pay compensation, but the Labour Commissioner still decided the question. It was held that the Commissioner's action was illegal and without jurisdiction, and that provision for appeal under the Act did not bar interference in writ petition by the High Court under Article 227 of the Constitution.

Appeal not accompanied with certificate by the Commissioner under Proviso (3).—Proviso 3 to sub-section (1) of Section 30 imposes a condition precedent for preferring an appeal. The deposit of compensation awarded is a condition for availing remedy of appeal. The inconvenience caused to the employer is not reason to strike down the statutory provisions and this proviso is not *ultra vires*.[6]

It was held in *Nathamuni Gounder* v. *State of Tamil Nadu*[7] that the right of appeal is a creature of statute and conditions imposed for exercising such right would not render the right nugatory. Any memorandum of appeal must be accompanied by a certificate from the Commissioner that the amount payable under the order has been deposited before him by the employer. If the certificate is not filed within the period of limitation of an appeal, the appeal is incompetent under proviso 3 to sub-section (3) which is mandatory. But in case of omission to file the memorandum due to mistake in Counsel's office and not due to negligence of party, it has been held that sufficient cause exists and delay can be condoned under Section 5 of the Limitation Act, 1963.[8] Section 5 of the Indian Limitation Act, 1963 has been made applicable to appeals under Section 30 of the Workmen's Compensation Act. In *New Indian Assurance Co. Ltd.* v. *M. Jayarama Naik*,[9] an appeal was filed by the Insurance Company without depositing the amount of compensation determined. It was held that while filing an appeal the insurer is only stepping into the shoes of the insured and therefore, what the insured cannot do for himself, cannot be done by another on his behalf. Therefore, an appeal by Insurance Company without depositing the amount of compensation is not maintainable.

It was held in *Krishna Lime Works* v. *Presiding Officer/W.C. Commissioner*[10] that the Workmen's Compensation Act is a welfare legislation and when it provides a right of appeal with a condition, *viz.*, the deposit of amount of compensation for the security of the workman, then such a provision cannot be held to be inadequate right of appeal. Writ is no substitute for ordinary remedies. The remedy of appeal provided under this Act is adequate and efficacious.

Condonation of Delay.—Delay in filing a claim can be condoned if there is sufficient cause for not preferring a claim in time. Public authorities should avoid defending a claim on technical ground of delay or limitation avoiding an order on

1. *Abdul Rashid* v. *Hanuman Oil and Rice Mills*, AIR 1951 Assam 88.
2. AIR 1979 MP 31.
3. *Secy. of State* v. *Mt. Mariam*, AIR 1937 Sind 126.
4. *Abdul Matin* v. *Besedi Rojwar*, AIR 1939 Pat 181.
5. 1969 Lab IC 898 (Pat).
6. *Narayanan Nair* v. *Union of India*, (1980) 2 Lab LJ 520 (Kerala).
7. (1986) 2 LLJ 423 (Mad).
8. *M/s. Chowgule & Co. (Pvt.) Ltd.* v. *Smt. Felicidade Rodrigues*, AIR 1970 Goa 127.
9. *New Indian Assurance Co. Ltd.* v. *M. Jayaram Naik*, (1984) 1 LLJ 171 (Kerala).
10. (1996) 1 Lab LJ 302 (Raj).

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merits.[1]

In *Indirani Surulimani* v. *Commissioner for Workmen's Compensation, Madurai and another*,[2] a workman was employed as a car driver by the husband of the present appellant. Both the driver and the employer died in a collision of the car with a lorry on 7 April 1974. A claim for compensation was made by the widow of the driver about 4 years after the death in 1978 which was contested by the widow of the employer, the appellant. In an appeal against the order of the Commissioner, two objections were raised, one that there was delay in making claim and second that the Commissioner had no territorial jurisdiction to decide the claim as the accident had occurred outside his jurisidictional limit. It was held that since these objections were not raised before the authority below, the Commissioner had no occasion to either consider the said issues and give its findings or give an opportunity to the claimant of compensation before that authority to set right matters as best as could be possible. Therefore these objections cannot be allowed to be raised at appellate stage.

It was held in *General Manager* v. *Chickabora*[3] that the Commissioner for Workmen's Compensation decides the claim as a tribunal. He exercises the powers of a civil court for certain purposes but is not a civil court. Therefore, like any other judge or a court he does not become a necessary or a proper party to the appeal unless allegations are made against him which require his personal presence before the court to explain the same. For effective adjudication of the appeal the presence of the Commissioner is not necessary because he has no personal right or interest in the subject matter of the appeal.

Section 30-A. Withholding of certain payments pending decision of appeal.—Section 30-A of the Act empowers the Commissioner to withhold payment of any sum deposited with him where an appeal has been filed by the employer under Section 30(1)(a). The Commissioner may do so in his own discretion. The High Court may also direct him to withold any such sum pending decision of the appeal. The discretion so vested in the Commissioner ought to be exercised judiciously keeping in view all the circumstances of the case. It has to be borne in mind that the right of appeal under the Act is not an absolute but a restricted right given only when a substantial question of law is involved. Therefore, in order that the cases of payment of compensation may be expeditiously and properly dealt with and the object of the Act may not be frustrated in any case in which an order or direction is made by a Commissioner for a stay or for the retaining of the money in court pending an appeal, an application shall be made by the appellant to the court within one month, asking for expedition of the appeal and also for the giving of any direction which the court may deem fit to give with regard to the maintenance of the dependants in the meantime.[4]

Section 31. Recovery.—Section 31 clearly contemplates that the Commissioner shall himself recover arrears and for that purpose he is to be deemed a public officer within the meaning of Section 5 of the Revenue Recovery Act, 1890.[5] The Commissioner has power to recover any amount payable by any person under this Act whether under an agreement for payment of compensation or otherwise. He can himself start the proceedings for recovery of any sum without being moved by a party who has not been paid, if the amount decided to be deposited in the court has not been

1. *Trustees of Port of Bombay* v. *Premier Automobiles*, AIR 1974 SC 923 ; *Mangal Chand* v. *Forest Department, Kinnaur*, (1985) 1 LLJ 369 (HP).
2. (1992) 1 Lab LJ 756 (Mad).
3. (1992) 1 Lab LJ 717 (Karn).
4. *Gani Sane Shaikh* v. *Sonabai and Co.*, AIR 1949 Bom 110.
5. *Century Flour Mills Shikarpur* v. *Amir Buksh*, AIR 1937 Sind 6.

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deposited.[1] It is not obligatory upon the Commissioner to recover any arrears under this Act through the Collector. But if he makes a request to the Collector, the Collector shall proceed under the provisions of the Public Demands Recovery Act.

It is nowhere laid down that the order of the Commissioner is to be treated as a decree of Civil Court and that the provsions of the Code of Civil Procedure apply for the recovery of such dues. When an amount is to be recovered as an arrears of land revenue, an execution application in the Civil Court is not mainainable for the recovery of that amount.[2]

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1. *State of Madras* v. *B.G.P. Lorry Service*, AIR 1960 Mad 336.
2. *Vaijnath Ranba Gavli* v. *Bhanudas Chokoda Rode*, (1983) 2 LLJ 298 (Bom).

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CHAPTER IV
RULES

Section 32. Power of the State Government to make rules.—(1) The State Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely—

(a) for prescribing the intervals at which and the conditions subject to which an application for review may be made under Section 6 when not accompanied by a medical certificate ;

(b) for prescribing the intervals at which and the conditions subject to which a workman may be required to submit himself for medical examination under sub-section (1) of Section 11.

(c) for prescribing the procedure to be followed by Commissioner in the disposal of cases under this Act and by the parties in such cases ;

(d) for regulating the transfer of matters and cases from one Commissioner to another and the transfer of money in such cases ;

(e) for prescribing the manner in which money in the hands of Commissioner may be invested for the benefit of dependants of a deceased workman and for the transfer of money so invested from one Commissioner to another ;

(f) for the representation in proceedings before Commissioner of parties who are minor or are unable to make an appearance ;

(g) for prescribing the form and manner in which memoranda of agreements shall be presented and registered ;

(h) for the withholding by Commissioner, whether in whole or in part, of half-montly payments pending decision on applications for review of the same ;

(i) for regulating the scales of costs which may be allowed in proceedings under this Act ;

(j) for prescribing and determining the amount of the fees payable in respect of any proceedings before a Commissioner under this Act ;

(k) for the maintenance by Commissioner of registers and records of proceedings before them ;

(l) for prescribing the classes of employees who shall maintain notice-books under sub-section (3) of Section 10, and the form of such notice-books ;

(m) for prescribing the form of statement to be submitted by employers under Section 10-A ; * *

(n) for prescribing the cases in which the report referred to in Section 10-B may be sent to an authority other than the Commissioner ;

(o) for prescribing abstracts of this Act and requiring the employers to display notices containing such abstracts ;

(p) for prescribing the manner in which diseases specified as occupational diseases may be diagnosed ;

(q) for prescribing the manner in which diseases may be certified for any of the purposes of this Act ;

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(r) for prescribing the manner in which, and the standards by which incapacity may be assessed.

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before the State Legislature.

Section 33. [Repealed by the A.O. 1937].

Section 34. Publication of rules.—(1) The power to make rules conferred by Section 32 shall be subject to the condition of the rules being made after previous publication.

(2) The date to be specified in accordance with clause (3) of Section 23 of the General Clauses Act, 1897 (10 of 1897), as that after which a draft of rules proposed to be made under Section 32 will be taken into consideration, shall not be less than three months from the date on which the drafts of the proposed rules was published for general information.

(3) Rules so made shall be published in the Official Gazette and, on such publication, shall have effect as if enacted in this Act.

Section 35. Rules to give effect to arrangements with other countries for the transfer of money paid as compensation.—(1) The Central Government may by notification in the Official Gazette, make rules for the transfer to any foreign country of money deposited with a Commissioner under this Act which has been awarded to or may be due to, any person residing or about to reside in such foreign country and for the receipt, distribution and administration in any State of any money deposited under the law relating to workmen's compensation in any foreign country which has been awarded to or may be due to any person residing or about to reside in any State :

Provided that no sum deposited under this Act in respect of fatal accidents shall be so transferred without the consent of the employer concerned until the Commissioner receiving the sum has passed orders determining its distribution and apportionment under the provisions of sub-sections (4) and (5) of Section 8.

(2) Where money deposited with a Commissioner has been so transferred in accordance with the rules made under this section, the provisions elsewhere contained in this Act regarding distribution by the Commissioner of compensation deposited with him shall cease to apply in respect of any such money.

Section 36. Rules made by Central Government to be laid before Parliament.—Every rule made under this Act by Central Government shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid ; both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under this rule.

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THE EMPLOYEES' STATE INSURANCE ACT, 1948

CHAPTER I
PRELIMINARY

Introduction.—Many important Social Security Schemes had been introduced in our country before independence. The urgency of such Schemes has been more badly felt after World War II. Social security to the workers of an industry can be provided by a self-balancing Scheme of Social Insurance or by public assistance or a combination of the two methods.[1] Social security measures adopted in any country can be said to be dependent upon a number of factors *viz.*, population, economic resources, standard of living, availability of technical experts and development of industry. The Workmen's Compensation Act, though designed to protect and safeguard the interest of the labour was in the nature of social assistance and not social insurance. The Employees' State Insurance Act was first of such measures adopted in India to provide for social insurance to the labourers. Many other fields of social insurance like health and unemployment are still left untouched.

The question of providing sickness insurance first came for consideration by the Government of India in 1928 when it considered to ratify the draft conventions and recommendations adopted at the Tenth International Labour Conference in 1927. But the Government did not consider it feasible to adopt any such legislation. The Royal Commission on Labour 1931 also suggested for early adoption of these measures. The question of insurance of invalids, widows, old age and orphans was considered by the Government from time to time but no Scheme providing for any such benefits was introduced for administrative and financial considerations.

In the Conference of Labour Ministers held in January 1940, it was decided to invite the views of the Provincial Government, employers and workers about compulsory contribution of the sickness insurance fund. The second Conference of Labour Ministers held in 1941 was of the opinion that any such legislation must be preceded by an actual examination of the problem in certain industries. A year after the Third Conference of Labour Ministers was called for to examine a tentative sickness Scheme prepared by the Labour Department of the Government of India. The Conference agreed to introduce the Scheme on a selective basis and recommended a sickness insurance scheme to workers in jute, cotton and heavy engineering industries. In March, 1943 the Government of India appointed Prof. B.P. Adarkar as a special officer to report on health insurance of the industrial workers in India. The report submitted by Prof. Adarkar in August, 1944 contained comprehensive contributory scheme of social insurance. Some improvements in the above scheme were suggested by Messrs. Maurice Stack and Raghunath Rao, members of I.L.O., who examined it at the invitation of the Government of India. The Adarkar Report and suggestions made by the two I.L.O., members were discussed by Labour Conference in October, 1944, and by the Standing Labour Committee in March, 1945. The following

1. Kothari, Industrial Law, 5th.

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recommendations were made :

(i) the Central Government should proceed with the preparation of a Scheme of health insurance applicable to all perennial factories and covering employment injuries and maternity benefits if possible, and

(ii) that the scheme should be circulated to Provincial Governments and associations of employers and workers before a Bill was drafted.

The Employees' State Insurance Bill providing for compulsory sickness, maternity and employment injury benefits for workers in perennial factories was introduced in the Central Legislature on 6th November, 1946. It was passed in 1948.

The Employees' State Insurance Act is a legislation which aims at bringing about social and economic justice to the poor labour class of the land. It aims at the labour welfare. But labour welfare is an elastic term bearing somewhat different interpretation in one country from another according to different social customs, the degree of industrialisation and the educational development of the workers.[1] Investigation Committee of the Government of India has preferred to include under welfare activities anything done for the intellectual, physical, moral and economic betterment of workers whether by employer's, by Government or by other agencies, over and above what is laid down by law or what is normally expected as part of contractual benefits for which workers have bargained. Labour Welfare is a very comprehensive term and includes everything undertaken by the State, employers and association of workers for the improvement of workers' standard of living and promotion of their social and economic well-being.

These welfare activities need to be considerably extended so as to cover workers of every factory, industry, mines, plants and communication, etc. A definite minimum standard of welfare should be laid down, which has to be observed by all employers.

Section 1. Application and scope of the Act.—The Employees' State Insurance Act, 1948, extends to the whole of India. Section 1(3) of this Act empowers the Central Government to enforce different provisions of the Act in different States or part thereof on different dates. These dates of enforcement are to be made public by a Gazette notification issued by the Central Government. According to Section 1(4), the Act in the first instance applies to all factories including factories belonging to the Government other than seasonal factories.

According to proviso to Section 1(4) nothing contained in sub-section (4) shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

According to Section 1(5), the Central Government in consultation with Employees' State Insurance Corporation or the State Government with the approval of the Central Government, may extend different provisions of the Act or any of them to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise. But for any such extension of the provisions the Appropriate Government has to give six months' notice.

Proviso to sub-section (5) States that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.

According to sub-section (6) a factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of

1. Report of the Royal Commission on Labour, P. 261.

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persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.

In *Pondicherry State Weavers' Co-op. Society* v. *Regional Director, Employees' State Insurance Corporation, Madras*,[1] the question was whether the provisions of the E.S.I. Act are applicable to weavers' co-operative society whose workers are shareholders of the society. It was held that a Co-operative society, on registration, becomes a body corporate with a perpetual succession and it is legally independent of its members who constitute the society. Once the society is independent of its members and has a separate legal existence apart from its members, then there is no bar for the society employing its members. And if such members are employed they are entitled to be covered by the E.S.I. Act.

In *Kunnathunad C.S. Co-op. Society* v. *Regional Director, E.S.I.C.*[2] it was held that a co-operative society is a separate legal entity distinct from its members. Hence a society employing its members for wages in manufacturing process is liable to be covered under the Act.

In *Brooke Bond India Ltd.* v. *E.S.I. Corporation*,[3] the branch office of Brooke Bond engaged in buying and exporting tea was held to be covered by the definition of shop for the purposes of notification under Section 1(5) of the Act.

The Government of Kerala extended by a notification the provisions of the Employees' State Insurance Act, 1948 to hotels, restaurants and shops etc. In *P.K. Mohammad Pvt. Ltd., Cochin* v. *E.S.I. Corpn.*,[4] it was held that the establishment engaged in the business of stevedoring, clearing and forwarding at port would be a shop. Clearing the documents is necessary for the export or import of goods and a stevedore is rendering service to cater to the needs of exporters and importers and others who want to carry the goods further. Therefore the establishment of the appellant in question is a shop and is covered by the Act.

Cochin Shipping Company was also held to be a shop carrying on a systematic economic or commercial activity.[5] Similarly it was held in *Employees' State Insurance Corporation* v. *Oxford University Press*,[6] that the premises where the publications of the Oxford University are sold was a shop within the meaning of the Tamil Nadu Government notification and the provisions of the Act were applicable to it.

In *Spencer & Co. Ltd. Ernakulam* v. *Regional Director, E.S.I.C. Trichur*,[7] the registered office of the company was situated outside the State of Kerala and the company was allegedly having its two branches, one each in Fort Cochin and Ernakulam. It was held that in the absence of a finding that the employees working in the Fort Cochin branch are under the control or supervision of the Ernakulam branch or that they were doing work connected with the work of Ernakulam branch or the *vice versa* there is no justification for linking the employees of the two branches. Ernakulam branch is not acting as area office under which Fort Cochin branch is functioning. Therefore Fort Cochin branch is an independent establishment and will not be covered by the notification issued regarding application of the Act in respect of Ernakulam branch.

In *Dattaram Advertising Pvt. Ltd.* v. *Regional Director, E.S.I. Bombay*[8] the

1. (1983) 1 LLJ 17 (Mad).
2. (1989) 2 Lab LJ 27 (Kerala).
3. (1980) 1 LLJ 352 (Kerala).
4. (1993) 1 LLJ 482 (SC).
5. *Cochin Shipping Co.* v. *E.S.I. Corporation*, (1993) 2 LLJ 795 (SC).
6. (1993) 1 LLJ 760 (Madras).
7. (1991) 1 Lab LJ 54 (Kerala).
8. (1987) 1 LLJ 9 (Bom).

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question for consideration was whether an advertising agency' may be covered under the expression 'shop'. The Government of Maharashtra issued a notification under Section 1(5) of the E.S.I. Act extending all the provisions of the Act to establishments given in the Schedule which included 'shops' as well. It was held that the expression 'shop' has to be understood as used in common parlance that is to say a place where goods are sold and/or services are rendered. A visual or a catchy tune in an advertising agency would be a type of intellectual property for which copyright could be claimed but it would be doing violence to the language to call the suits of such intellectual activity a 'shop' because the general sense of the community would not accept such a concept.

In *Reunion Engg. Co. Pvt. Ltd.* v. *E.S.I.C.*,[1] it was held that the premises where the business of undertaking electrical works contracts in the factories and other places of customers was carried on is a shop and the Act applies by virtue of the notification issued by Karnataka Government extending the provisions of the Act to shops. The word "otherwise" used at the end in Section 1(5) of the Employees' State Insurance Act should be interpreted to achieve the object of the Act, namely, the welfare of the low paid employees.

It was held in *E.S.I.C.* v. *R.K. Swamy & others etc.*,[2] that an advertising agency sells its expert services to a client to enable the client to launch an effective campaign for his products. The premises of such an advertising agency can reasonably be said to be a shop. Therefore it would be covered by the Act where a notification has been issued by the Government of a State bringing a shop under the Employees' State Insurance Act.

In *Cemendia Company Ltd.* v. *Employees State Insurance Corporation*[3] the Company was having a workshop, (depot) soil testing laboratory and godown which were covered by the Act. The workmen at various sites were engaged in construction activities. They do not do anything in relation to workshop or incidental to workshop though the workshop does repairing of machines. Similarly materials in the godown are sent to the work sites. The results of soil testing are sent from laboratory to worksites. It was held that the workmen engaged in construction at sites cannot be said to be manufacturing anything and are not covered by the Act because workshop does some work in connection to construction activity at sites but not *vice-versa.*

In *Kuriakose* v. *Employees' State Insurance Corporation*,[4] the appellant company was rendering services to customers by way of giving advertisement materials by employing skilled workers where service were in the form of consultation and advice. It was held that the said company was not a 'shop'. Though the word 'shop' liberally interpreted would take in any place where services are rendered, it will not include the premises where basically and mainly "intellectual activity is taking place" and "things are not sold or purchased". It was further observed that only where the services are sold for any person who wants to avail of the same and were made available on payments of a stipulated price will be a 'shop'.

In *Employees' State Insurance Corporation* v. *Dattaram Advertising (Private) Ltd.*,[5] it was held that shop even in its expanded meaning must be a place where goods and the services are sold in a tangible form. An advertising firm in the course of its business or commercial activity does not sell any unit of work. The services rendered are more in the nature of supply of an idea rather than of service of any particular

1. (1993) 1 LLJ 31 (Karn).
2. (1994) 1 LLJ 636 (SC).
3. (1995) 2 LLJ 519 (Bom).
4. (1989) 1 Lab LJ 1 (Kerala).
5. (1988) 1 Lab LJ 413 (Bom).

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tangible type. Therefore Advertising Agency is not shop to which the Act can be extended.

The words "or otherwise" used in Section 1(5) must be read in the context of the words "class of establishments, industrial, commercial, agricultural". So read the power given is to extend the provisions of the Act having regard to the nature of operations carried out in the establishments and not having regard to their geographical location.[1]

In *Employees' State Insurance Corpn., Gauhati* v. *Rajashi Pictures (P) Ltd., Gauhati*,[2] the main business of Rajashi Picture Ltd. was located at Jaipur and its branch business was carried on at Gauhati wherein in less than 20 persons were employed. It was held that the Act is a beneficial piece of legislation in the interest of labour in factories. In the present case branch at Gauhati is part of the main establishment at Jaipur and is under the administration of the Branch Manager for the business of film distribution. The employees at Gauhati branch, even though less than 20, are a part of the main establishment at Jaipur and, therefore, branch office is covered by the Act.

In *International Ore & Fertilisers (India) Pvt. Ltd.* v. *E.S.I. Corporation*,[3] the appellant is a limited company having its central office at Secunderabad where trading and commercial activity relating to sale of imported fertiliser takes place but no delivery of goods takes place at the premises. The establishment of the company at Secunderabad was held to be a shop as it carries on a commercial activity facilitating emergence of contract of sale between its foreign principals and State Trading Corporation and Metal Trading Corporation of India. To constitute a 'shop' it is not necessary that delivery of goods to the purchasers should take place at the premises in Secunderabad. If orders are received at a place, which ultimately fructify into sales and the resulting trading activity is directed from there, that place is a 'shop'.

In *M/s. Modi Rubber Ltd.* v. *The Regional Director, E.S.I. Corporation*,[4] the company after manufacturing the commodities out of rubber at its Mohipuram factory conveys the same to its Depot-cum-sale office at Hyderabad from where it supplies the commodities to the distributors. The State Government by a notification extended the Act to Hyderabad shops which employed more than 20 persons. Factory manufacturing rubber goods is not covered by the Act. It was held that the E.S.I. Act contemplates that whenever the main factory or establishment is covered by the Act, the branches will be covered. There is no explicit provision in the Act that whenever the main factory is not covered by the Act, a branch should not be covered eve.. under the powers conferred under Section 1(5) of the Act. There is no fetter imposed on the State Government for extending the benefits under Section 1(5) to such other branches wherein 20 or more employees are engaged even though the parent unit is not covered. Therefore the Godown-cum-sales office at Hyderabad will be covered under Section 1(5) of the Act.

In *Employees' State Insurance Corporation* v. *Ram Chander*,[5] the question for consideration was whether a tailoring shop employing 10 to 12 persons, and stitching cloth supplied by customers using electric iron manually is covered by the Act or not. It was held that if a new substance is brought into existence or if a new or different article having a distinctive name, character or use results from particular processes, such process or processes would amount to manufacture. In that process the ironing of clothes has been found to be an essential part and for that power is used. Therefore this tailoring shop comes within the purview of the Act.

In *Employees' State Insurance Corporation, State of Maharashtra* v. *Fariyaz*

1. *Fariyas Hotels Pvt.* v. *State of Maharashtra*, (1983) 1 LLJ 24 (Bom).
2. (1991) 1 Lab LJ 109 (Gauhati).
3. (1988) 1 Lab LJ 215 (SC).
4. (1988) 1 Lab LJ 9 (AP).
5. (1988) 2 Lab LJ 141 (SC).

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Hotels,[1] it was held that the expression "class of establishments" in Section 1(5) is not limited to nature of activities. The scheme of the Act does not provide that the provisions of the Act should be made applicable to all the areas and all the establishments at one stroke or to none at all. The exclusion of certain areas while extending the provisions to other establishments in a particular area could not amount to encroachment of the powers of the Central Government under Section 1(5) of the Act.

Constitutionality of the Act.—Section 1(3) of the Act was challenged to be *ultra vires* of Article 14 of the Constitution of India and for providing uncontrolled discretion vesting wide powers with the Central Government without laying down any policy for its guidance for the enforcement of different provisions of the Act. Mootham, C.J. of the Allahabad High Court observed :

> "In order to attract the operation of Article 14 it is necessary to show that the power of differentiation does not rest on any reasonable basis having regard to the object which the legislature had in view. The legislature in enacting the Act intended that the benefits which it provided should as circumstances rendered it practicable become available to the employees in all factories throughout India excluding of course the State of Jammu and Kashmir. The Act is of such a nature that it is reasonable if not imperative that a large measure of discretion be conferred on the Central Government with regard to the manner in which it should come into force..... The discretion which is vested in the Central Government under Section 1(3) is undoubtedly very wide, but taking into account the policy of the legislature and the administrative difficulties of operating the Act, the discretion does not involve a contravention of provisions of Article 14."[2]
>
> "A discretionary power is not necessarily a discriminatory power and abuse of power is not to be easily assumed where the discretion is vested in the Government and not in a minor official."[3]

Similarly the constitutionality of Section 1(5) of the Act was also challenged in *M/s. Hindu Jea Band, Jaipur* v. *Regional Director, E.S.I., Jaipur and State of Rajasthan*.[4] The State of Rajasthan issued a notification under Section 1(5) of the E.S.I. Act bringing within the purview of the Act shops in which 20 or more persons had been employed for wages on any day on the preceding 12 months. Contributions were asked to be paid from a firm carrying on business of playing music on occasions such as marriages and others. The liability to pay contribution was challenged on the ground that the place where the firm was carrying on business was not a shop and also that its business was intermittent and of seasonal character. It was held that the word 'shop' has not been defined in the Act and this word cannot be construed narrowly because notification has been issued under Section 1(5) of the Act which is a beneficient legislation. It is obvious from the meaning given in Collins English Dictionary that "shop is a place where services are sold in retail basis". The firm has been making available on payment of price the services of the members of the group of musicians employed by it on wages. Hence the place where the firm has been carrying on business is a shop and the establishment is covered by the notification.

It was further held that the power conferred on the State Government by Section 1(5) does not suffer from vice of excessive delegation of essential legislative powers. Application of the Act to business carried on during certain seasons only of the year is not violative of Article 14, Article 19(1)(g) and Article 21 of the Constitution of India.

1. (1989) 1 Lab LJ 356 (Bombay).
2. *Anand Kumar* v. *Employee's State Insurance Corporation*, AIR 1957 All 136.
3. *Matajog Dokey* v. *H.C. Bhavi*, AIR 1955 SC 44.
4. (1987) 1 LLJ 502 (SC).

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In *E.S.I. Corpn.* v. *K. Janardhana Rao*,[1] the State Government extended the provisions of the Act to the restaurants and hotels situated in particular places in the State. It was held that the notification was neither violative of Section 1(5) nor Article 14 of the Constitution. The expression "any other establishment or class of establishments" in Section 1(5) to which the appropriate Government intended to extend the Act may be classified either on the basis of the nature of the establishments or on the basis of other geographical situation or on the basis of both of them.

Section 2. Definitions

(1) **Appropriate Government.**—Appropriate Government means the Central Government in respect of establishments under the control of the Central Government or a railway administration or a major port or a mine or oil-field and the State Government in all others cases.

(3) **Confinement.**—Confinement means labour resulting in the issue of a living child, or labour after twenty-six weeks of pregnancy resulting in the issue of a child whether alive or dead.

(4) **Contribution.**—Contribution means the sum payable to the Corporation (*i.e.*, Employees' State Insurance Corporation) by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act.

(6) **Corporation.**—Corporation means the Employees' State Insurance Corporation set under this Act.

(6-A) **Dependant.**—There are three categories of dependants under the Act. In the first category are included :

(1) a widow ;
(2) a minor legitimate or adopted son ;
(3) an unmarried legitimate or adopted daughter ;
(4) a widowed mother.

For the above dependants it is not necessary that they should in fact be dependant upon the earnings of the deceased insured person.

For the dependants included in the second category, it is necessary that they must in fact be wholly dependant upon the earnings of the insured person at the time of his death. The relatives are—

(1) a legitimate or adopted son, who has attained the age of 18 years and is infirm ;
(2) a legitimate or adopted daughter who has attained the age of 18 years and is infirm.

Dependants of the third category may claim benefit under the Act provided they are wholly or in part dependant on the earnings of the deceased insured person at the time of his death. These relatives are as follows :—

(1) a parent other than a widowed mother,
(2) a minor illegitimate son,
(3) unmarried illegitimate daughter,
(4) legitimate daughter if married and minor,
(5) adopted daughter if married and minor,
(6) illegitimate daughter if married and minor,
(7) legitimate daughter if widowed and minor,
(8) adopted daughter if widowed and minor,

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1. AIR 1979 Kant 146.

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(9) illegitimate daughter if widowed and minor,
(10) a minor brother,
(11) an unmarried sister,
(12) a widowed sister if a minor,
(13) a widowed daughter-in-law,
(14) a minor child of a predeceased son,
(15) a minor child of a predeceased daughter where no parents of the child is alive, or
(16) a paternal grand-parent if no parent of the insured person is alive.

Question of Dependency.—The purpos of the Act is not to provide solatium to a relative of a deceased insured person but to make good the actual loss which he or she has suffered. Whether a relative of the deceased is dependant or not, is a question of fact to be decided in relation to particular circumstances of each case. Normally when the earning of the deceased workman was hardly sufficient for his maintenance and no balance was left which would contribute to the family fund the parent cannot be said to be a dependant.[1] In a later case it has been pointed out that in case of poor working families particularly those living jointly all the earnings come into a common pool and it may often happen that the common pool is actually quite insufficient to maintain the members at a bare standard of existence.[2] But it is extremely difficult to lay down any hard and fast rule about what is sufficient for the maintenance of an individual person and to work out an excess out of his earnings available for the father, mother, and the other members of his family to enjoy.[3] In case of those relatives who have to be in fact wholly or in part dependent upon the earning of the deceased insured person, they must be so dependent at the time of his death.

Widow.—A widow after remarriage does not cease to be dependent and is not disentitled to receive compensation because subsequent events do not affect the claim to compensation.

Mother.—A widowed mother whether wholly or in part dependent on the earnings of the deceased or not is a dependant under Section 2(6-A)(i). Mother, other than widowed mother, comes under the category of a parent other than a widowed mother. She will be entitled to benefits under the Act if she is wholly or in part dependent on the earnings of the deceased. Re-marriage does not bar her claim under the Act.[4] But this view does not hold good now, after the amendment of the Workmen's Compensation Act in 1959. A widowed step-mother is not a dependant under the Act.[5] But an 'adoptive widowed mother' would be included in the phrase 'widowed mother'.[6]

Minor brother.—Minor brother includes both consanguine brother and uterine brother.[7]

Parents.—Father and mother other than a widowed mother may be called dependants under the Act provided they succeed to show that they were wholly or in part dependent on the earnings of the deceased at the time of his death. In a case[8] after the death of an employee Gulsher Singh, his father and mother claimed themselves to be dependent on the earnings of their deceased son at the time of his death. Gulsher Singh helped his father after he attained the age of 15 years. He gave all his earnings

1. *St. Joseph's Automobile* v. *Maria Soosai Pillai*, AIR 1953 Madras 206.
2. *Ponuswami Gounder* v. *Rangaswamy*, AIR 1953 Madras 786.
3. *Ibid.*
4. *Intiabji* v. *N.C. Colliery*, AIR 1959 MP 329.
5. *Dirji* v. *Smt. Gorten*, AIR 1942 Pat 33.
6. *Additional Deputy Commissioner Singhbhum* v. *Smt. Laxmibai Naidu*, AIR 1945 Nag 238.
7. *In re* Dependents of Kartar Singh, AIR 1931 Lah 752.
8. *Kamal Singh* v. *E.S.I.C.* (1962) 2 LLJ 298.

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to his father. In this case the Insurance Court appears to be influenced by the period of contribution that the deceased contributed to the family fund for a short period of two months. The question of dependence has to be settled with reference to the time of death and is not concerned with duration. It seems, therefore, that the Insurance Court misdirected itself on a question of law touching the meaning of the expression 'dependant' as used in the Employees' State Insurance Act and that on fact which the Insurance Court found there follows an irresistible conclusion in law that the parents were in part dependent on the earnings of their deceased son. It is of course not possible to lay down any general rule to determine who would be a 'dependant' for that would turn on the fact of each case.[1]

(7) **Duly Appointed.**—Duly appointed means appointed in accordance with the provisions of this Act or with the rules or regulations made thereunder.

(8) **Employment Injury.**—The following are the ingredients of an Employment Injury :

(1) The injury must be *personal* to an employee.

(2) The injury must be caused by an—

(i) *accident* ; or

(ii) *occupational* disease.

(3) The accident must *arise out of and in the course of employment.*

(4) The *employment* must be *insurable.*

Employment.—The concept of employment implies three essential elements : (i) employer ; (ii) employee ; and (iii) the contract of service. The employment is a contract of service between the employer and employee whereunder the employee agrees to serve the employer subject to his control and supervision.[2] Employment is not confined to actual work or place of work. It extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do.[3]

For a proper understanding of the definition of 'employment injury' it is necessary to know the meaning of certain words and expression used in this sub-section. I have already discussed under the Workmen's Compensation Act the meanings of 'accident', 'personal injury' and 'occupational disease'. They apply in this Act also. Similarly the meaning of the expression 'arising out of and in the course of employment' and 'notional extension of employers' premises' discussed under the Workmen's Compensation Act applies to this Act also.

In *Rajappa* v. *Employees' State Insurance Corporation*,[4] an employee of the KIMCO was attacked by some persons and his left hand was cut off while he was on his way to home after finishing the work in the factory. The coporation met all the expnses when he was under treatment. It was held that where employment is not a contributing factor to create any incident or accident, or to accelerate causes of death or personal injury of employee, a claim cannot be made for compensation under the Act. The condition precedent to a liability under the Act is causal connection or association between the employment and injury caused by accident. The doctrine of notional extension has to be applied to the factual situation pertaining to the particular case. In the present case there is no relationship between the assault causing injury to the employee and the employment.

In *Maherunisha Ahemad Khan Pathan and others* v. *Employees State Insurance*

1. *Kamal Singh* v. *E.S.I.C.*, (1962) 2 LLJ 298.
2. *Chintaman Rao* v. *State of M.P.*, AIR 1958 SC 388.
3. 1955 ILR (Punj) 922.
4. (1992) 2 LLJ 714 (Kerala).

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Corporation,[1] a workman while returning home was assaulted by a mob during communal riots and died. It was held that the place of accident need not necessarily be located within the limits of the factory premises so long as the place of accident falls within a zone which can be notionally deemed to be the zone of the factory for the propose of the Act by recourse to the theory of notional extension. Therefore death was employment injury within the meaning of Section 2(8) of the Act.

In *Sathyabhama* v. *E.S.I. Corpn*,[2] an woman employee while returning home was hit by a scooter on public road in front of the factory gate. It was held that theory of notional extension cannot be reduced to a mathematical formula of distance and time. Decision would depend on the facts and circumstances of each case. In the present case considering both the point of time as well as that of distance the theory of notional extension shall apply and the injury sustained is an employment injury.

In *Sheela* v. *E.S.I. Corpn.*[3] an employee of M/s. Electronic Product of India, Chandigarh left his house at about 8.30 a.m. to join his duties at 9 a.m. He died at bus-stand while waiting for the local bus. It was held that the employee died while he was going to his place of work. The theory of notional extension will apply and the death occurred in the course of employment.

In *Indian Rare Earths Ltd.* v. *Subaida Beebi*,[4] a workman of the appellant was involved in an accident while travelling by his cycle to the workspot. The employer has provided for bus subsidy to its workmen but the concerned workman was not residing on any of the bus routes and hence he used to go by bicycle. While on way to the workspot a car dashed against him on the public road and he died. It was held that although travelling by bus was an implied condition of service but in view of the fact that the concerned workman was not on any of the bus route, the exigencies of the employment and circumstances obliged him and the company allowed him to ride a bicycle to reach the work place. In other words it was an implied condition of his employment that he may travel to his work place from his residence and back home by a bicycle. Therefore, the workman was in the course of his employment from the moment he began to ride the bicycle for reaching his work place.

It was further held that an injury sustained by an employee by an accident arising in the course of his emplyment is, in all cases without exception, one arising out of his employment though perhaps it cannot be said that all injuries caused by accidents arising out of employment are injuries caused by accident arising in the course of employment.[5]

In *Regional Director E.S.I. Corpn.* v. *L. Runga Rao*,[6] an employee of M/s. Mysore Breweries Ltd., working as Refrigerator operator was runover and killed on the spot by an unidentified motor vehicle when he was on his way to factory to join his duty. His father claimed benefits under the Act by moving E.S.I. Court. The injury was held to be an employment injury. It was held that if it is proved that the injury to the employee was caused by an accident arising out of and in the course of employment then it is immaterial whether it occurred inside the factory or outside or whether it occurred during office hours or after. However, the place or time of accident should not be totally unrelated to the employment. There should be a nexus or causal connection between the accident and employment.

1. (1995) 2 LLJ 1 (Guj).
2. (1992) 1 Lab LJ 831 (Kerala).
3. (1991) 2 Lab LLJ 247 (P & H).
4. (1981) 2 LLJ 293.
5. *Ibid.*
6. (1982) 1 LLJ 299 (Kar).

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In *Regional Director, E.S.I.C., Ahmedabad* v. *Batulbibi and another*,[1] the workman of a textile mill while on duty had gone to canteen during the short recess to take tea, where he died of mio-cardiac infraction. His widow and son claimed compensation. It was held that the death arose out of and in the cases of employment because the recess period is not so long as to disrupt the continuity of the employment. If the recess was indeed short, the liberty of an employee to go away does not in reality mean anything, since he could not have gone so far as to snatch the continuity of his employment.

(9) **Employee.**—The definition of an employee as given in the Act is very comprehensive. The following are the ingredients of the definition of an 'employee' under the Act :

(1) The employment of the person must be for wages and it should be (i) in an establishment ; (ii) in a factory ; or (iii) in connection with the work of the factory including any work connected with :

(a) administration of the factory or establishment or any part, department or branch thereof ; or

(b) purchase of raw materials for the factory or establishment ; or

(c) distribution or sale of the product of a factory or establishment ; or

(2) The employee also includes any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing order of the establishment.

(3) The employee must be employed in any factory or establishment to which the Act applies. The employment may be :

(i) directly with the principal employer ; or

(ii) by or through an immediate employer ; or

(iii) lent or let on hire by the principal employer.

(4) In case of an employee directly employed by the principal employer, the employment must be on any work of the factory or establishment or any work—

(i) which is incidental or preliminary to ; or

(ii) connected with the work of the factory or establishment.

It is immaterial that the work is done in the factory or establishment or elsewhere.

(5) In case of an employee, employed by or through an immediate employer, the employment must be :

(i) in the premises of the factory or establishment ; or

(ii) under the supervision of the principal employer or his agent on work which is :

(a) ordinarily part of the work of the factory or establishment ; or

(b) preliminary to the work carried on in the factory or establishment ; or

(c) incidental to the purpose of the factory or establishment.

(6) In case of an employee whose services are lent or let on hire to the principal employer, the letting on hire must be by the person who has entered into a contract of service with the person whose services are so lent or let on hire. The employment of such a person by the principal emplyer must be in or in connection with the work of a factory or establishment to which this Act applies.

(7) The following are not employees :

(i) any member of the Indian Naval, Military or Air Force ; or

(ii) any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government.

1. (1988) 2 Lab LJ 29 (Gujarat).

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Overtime pay shall not be included in wages. In the term 'remuneration', employer's contribution to Provident Fund is not included.[1]

There is an exception to the above rule ; namely an employee whose wages exceed such wages as may be prescribed by the Central Government at any time after (and not before) the beginning of the contribution period shall continue to be an employee until the end of that period.

The definition of an employee under the Act has a wider meaning and it covers persons who work outside the business premises but whose duties are connected with the business. It also covers employees who are paid daily wages or employed on part time wages such as persons employed by a firm carrying on business of playing music on occasions like marriage, etc.[2]

In *Tara Chand Mohan Lal* v. *E.S.I. Corporation*,[3] 37 labourers were working for a considerable period in a factory, dealing in production of mustard oil and dal. These labourers were employed through sardars who were the immediate employer and the firm Mohan Lal was the employer. They were working under the supervision of the principal employer even if they were supplied by the sardars. These labourers were held to be "employees" within the meaning of Section 2(9)(1) of the Act as they were directly employed for wages by the principal employer in connection with the normal work of the factory.

In *Sen Raleigh* v. *E.S.I. Corpn.*,[4] the factory was situated at Asansol and the head office was situated at Calcutta. It was held that inspite of the fact that the head office and factory were situated at different places the employees in the head office who are engaged in any type of work specified in Section 2(9) are employees within the meaning of this Act because the head office is at Calcutta where the provisions of the Act are applicable.

In *Hyderabad Asbestos* v. *Employees' Insurance Court*,[5] the question was whether person employed in Zonal Office and Branch Offices of a factory and concerned with establishment and administrative work or the work of convassing sale would be covered by the provisions of the Act. It was held that an employee may be working within the factory or outside the factory or may be employed for administrative purposes or for the purchase of raw materials or for the sale of the finished goods, all such employees are included within the definition of "employee" in Section 2(9) of the Act. It is not essential that one must be working in a factory.

The definition of "employee" after amendment in 1966 is an exhaustive one. It applies not only to persons working in factory but even elsewhere provided they are engaged in types of work referred in Section 2(9). Section 38 of the Act does not appear to be an impediment to such beneficial extension of the definition. As such, person employed in registered office or head office at Calcutta, of company running a jute and cotton factory at Serampore in Hoogly and engaged in types of work referred to in Section 2(9) are employees within the Act.[6]

When there was nothing on record to show that there was any contract of employment between the company and the Managing Director, such Managing Director

1. *Manager Harrisons and Crosfield Ltd. Quilon* v. *Manager*, AIR 1970 Ker 194.
2. *Hindu Jea Band, Jaipur and Regional Director E.S.I., Jaipur* v. *State of Rajasthan*, (1987) 1 LLJ 502 (SC).
3. AIR 1971 A. and N. 65.
4. AIR 1977 Cal 165.
5. AIR 1968 SC 356.
6. *India Jute Co.* v. *E.S.I. Corporation, W.B.*, AIR 1977 Cal 258.

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will not come under the definition of an 'employee'.[1]

In *Director General E.S.I.C. & another* v. *The Scientific Instrument Co. Ltd.*,[2] the company with its head office at Allahabad has branch sales offices at Delhi, Bombay, Calcutta and Madras. The employees were engaged in the sale and distribution of the products of the Indian and foreign companies and the sale of the company's own products at the branch sales office is only marginal. It was held that the expression "employed for wages in or in connection with the work of a factory or establishment" is of very wide amplitude and its generality is not in any way prejudiced by the expression "and includes any person employed for wages on any work connected with the administration of the factory or establishment or in connection with sale or distribution of the products of the factory or establishment". The provisions of the Act have to be construed liberally. If the employment is in connection with the work of factory or establishment, the employees would come within the definition of Section 2(9) of the Act because what is important is whether the business of sale or distribution, either principally or marginally of the products of the foreign company is being done on behalf of the respondent company.

It was held in *E.S.I. Corporation* v. *Raj Kamal Transport & others*,[3] that the driver employed by the transport corporation to drive the truck on payment of remuneration for each trip is employed in connection with its business and he comes within the definition of employee under the Act.

In *Mohd. Ismail Ansari* v. *E.S.I.C., Bombay*,[4] the appellant claimed disablement benefit which was dismissed by the Insurance Court on two grounds : first that his wages exceeded Rs. 500 and secondly, that he could not claim to be an employee under Section 2(9). It was held that the word "wages" as defined in Section 2(22) means all remuneration paid or payable in cash to an employee if the terms of the contract of employment express or implied were fulfilled. Therefore, an employee who was paid only for 21 days in a month due to an accident so that the actual amount of wages paid to him was less than Rs. 500 would be an "employee" as defined in Section 2(9) as each case is to be determined by reference to the quantum of wages actually paid to the employee.

In *K. Venkateswara Rao* v. *State of A.P.*,[5] it was held that if a theatre manager who has no statutory obligation to run a canteen or provide cycle stand but for the better amenities of his customers and improvement of his business enters into an arrangement with another person to maintain a canteen or cycle stand and that other person employs on his own, workers in connection with the canteen or cycle stand, the manager of the cinema theatre is liable for contribution as the principal employer of the workman although they are engaged independently by the owner of the canteen or the cycle stand.

Whether a person is a casual labour or an employee would depend upon the fact whether there was a contract of service resulting in the relationship of master and servant and whether the person employed was under the disciplinary control of the other person or not. It is neither the length of service nor the manner in which parties choose to refer to such service that would be relevant.[6]

Employment.—The expression 'employed' suggests two meanings : (i) engaged or occupied, (ii) a contract of service between the workers and the owner of a factory,

1. *Frontier Motor Car Co. (P) Ltd.* v. *Regional Director, E.S.I.C. Gauhati*, (1991) 1 Lab LJ 828 (Gauhati).
2. (1995) 2 LLJ 122 (All).
3. (1995) 1 LLJ 94 (AP).
4. (1979) 2 LLJ 168 (Bom).
5. (1980) 1 LLJ 70 (AP).
6. *E.S.I.C.* v. *Ayurvedic Indust. Co-op. Pharmacy Puthur*, (1980) 2 LLJ 66 (Kerala).

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i.e., a relationship of master and servant. But the relationship of master and servant is not always necessary and there may be cases where there is no relationship of master and servant and yet such person would be an employee.

The principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work ; the nature and extent of the control must necessarily vary from business to business.[1] Where, therefore, in a handloom as well as a powerloom factory the master had a voice in the selection of the goods to be manufactured as well as in its quality and had also provided that the work should be done in his own premises by the workers, there was a contract of service even though they might be paid at a piece rate basis.[2]

In *E.S.I.C. Trichur* v. *Poopally Foods, Alleppy*,[3] the Kerala High Court was asked to determine whether an export firm dealing in prawns is liable to pay contribution under the Act for charges paid to an independent contractor for peeling and grading prawns. It was held that the answer to this question will depend on whether there was a 'contract of service' or a 'contract for service'. Since the firm had no supervision in the peeling and grading work done, therefore, there was no contract of employment. Workers were not the employees of the firm and hence the firm was not liable to pay any contribution under the Act in respect of the peeling and grading charges paid to them.

In *Bombay Wires Healds Manufacturing Company, Bombay* v. *E.S.I. Corporation*,[4] the company was an ancillary unit engaged in manufacture of Wire Healds in factory premises. The factory used to give these wires for threading and bundling to house-wives at their own homes. It was held that the house-wives who do the work at their own premises are not employees of the factory and hence the company is not liable to pay contribution under the Act in respect of them.

Apprentice if employee.—In *E.S.I. Corpn.* v. *Tata Engg. & Co.*,[5] it was held that apprentices are not employees. They are engaged by a Company merely as trainees for a particular period for a distinct purpose and the Company is not bound to employ them in their work after the training period is over. The object of apprenticeship is learning under certain agreed terms. Simply because certain payment is made to him and he has to be under certain rules of discipline do not convert him to a regular employee. They are not said to be employed in or in connection with the work of the Company. They are also not given wages within the meaning of that word in Section 2(22).

It was held in *Regional Director E.S.I. Corporation* v. *M/s. Arudyog & others*,[6] that the apprentices under any scheme are exempted from the operation of law relating to labour by virtue of clause (b) of Section 18 of the Apprentices Act. Hence apprentices are not employees for the purpose of determining the coverage of the Act.

Work incidental or preliminary to the work of factory.—If within the same premises or compound a number of departments are situate and all such departments are engaged in any work in connection with or incidental to manufacturing process of the factory, all of them would *prima facie* form part of the factory.[7] If a person is neither employed on any work of the factory, nor any work incidental or preliminary to or connected with the manufacturing process, he will not be an employee within the

1. *Kandaswami Weaving Factory* v. *Regional Director E.S.I.C. Madras*, 1969 Lab IC 362 (Mad).
2. *Ibid.*
3. (1985) ILL 10 (Kerala).
4. (1986) 2 Lab LJ 121 (Bom).
5. AIR 1976 SC 66 : (1976) 1 LLJ 81 (SC) ; *See* also *Regional Director, E.S.I. Corporation* v. *M/s. Fibre Mangalore (P) Ltd.* (1986) 1 Lab LJ 216 (Karn).
6. (1987) 1 Lab LJ 292 (Bom).
7. *Employees' Insurance Corporation* v. *Sriramula Naidu*, AIR 1960 Mad 248.

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meaning of the Act.[1]

It was held in *Regional Director, E.S.I. Corpn.* v. *Suresh Trading Company*,[2] that casual employees engaged by the immediate employer in connection with incidental or preliminary work of principal establishment or in connection with work of the principal establishment will be employees of the principal establishment.

In *Cemendia Company Ltd.* v. *Employees' State Insurance Corporation*,[3] the company with its Head Office at Bombay was carrying on construction of building all over India. It was held that since the employees of Head Office attend to administrative work, movement of machinery and payment of salary which are work in relation to or incidental to the work of factory, the employees of Head Office would be covered under the Act.

In *Regional Director, E.S.I. Corpn.* v. *Vijaya Mohini Mills*,[4] some workers were engaged by the contractor, the immediate employer in construction of additional building of the factory. It was held that additional building required for the expansion of the factory is ancillary or preliminary or connected with the work of the factory. The construction workers are employed for wages in work which is incidental to the purpose of the factory. They are employees of the Mill and wages paid to them will have to be reckoned for the purpose of computing contribution payable.

Similarly in *Regional Director, E.S.I. Corpn.* v. *Ramlal Textiles*,[5] yarn was supplied by manufacturers to master weavers who carried the yarn to to their work place and weave cloth either by themselves or other persons engaged by them. The manufactured cloth is sold to the manufacturers establishment. It was held that the right of rejection of sub-standard cloth spells out effective degree of supervision and control. Identical work as is done by outworkers is done in the premises of the factory. In view of all this the outworkers who are paid wages through contractors are employees as defined in Section 2(9) of the Act.

In *Regional Director E.S.I. Corporation, Madras* v. *South India Flour Mills*,[6] the Company which was engaged in milling wheat into wheat products employed worker on daily wage for construction of additional buildings in the compounds of existing factory as part of its expansion of the existing factory buildings. The Company was called upon to pay the contribution in respect of such daily wages workers. It was held that the definition of the term "employee" includes within its ambit any person employed on any work incidental or preliminary to or connected with the factory or establishment. It is difficult to enumerate different types of work which may be said to be incidental or preliminary to or connected with the work of the factory or establishment. Any work that is conducive to the work of the factory or establishment or that is necessary for the augmentation of the work of the factory or establishment will be incidental or preliminary to or connected with the work of the factory or establishment. In this view the work of construction of additional buildings has a link with the work of the factory and the workers engaged even for daily wages are employees within the meaning of Section 2(9) of the Act. The contribution is payable in respect of such employees. This view is supported by the provisions of Section 39(4) and Section 42(3) of the Act.

In *C.E.S.C. Ltd. etc.* v. *Subhash Chandra Bose and others*,[7] the respondents were

1. *Hindustan Corporation Co. Ltd.* v. *E.S.I. Corporation*, 1969 Lab IC 67 (Assam).
2. (1990) 1 Lab LJ 348 (Kerala).
3. (1995) 2 LLJ 519 (Bom).
4. (1990) 2 Lab LJ 464 (Kerala).
5. (1990) 2 Lab LJ 568 (Kerala).
6. (1986) 2 Lab LJ 364 (SC).
7. (1992) 1 Lab LJ 475 (SC).

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carrying on business of electrical installations as independent contractors holding licences from the Government of West Bengal. They were engaged to lay underground cable and errect overhead lines in public roads by Calcutta Electric Supply Corporation (India) Limited. The Employees State Insurance authorities informed C.E.S.C. that the employees whose wages are paid through contractors would fall within the scope of Section 2(9). The contractors contended that for carrying out their contracts they were not supervised by the C.E.S.C., the principal employer and they were carrying out works allotted to them at sites outside the factory establishment and as such the workers engaged by them were not covered by the definition of employee under Section 2(9) of the Act. It was held that when the employee is put to work under the eye and gaze of the principal employer, or his agent, where he can be watched secretly, accidently or occasionally while the work is in progress, so as to scrutinise the quality thereof and to detect faults therein, as also put to timely remedial measures by directions given, finally leading to the satisfactory completion and acceptance of the work, that would be supervision for the purposes of Section 2(9). This function can be delegated by the principal employer to his agent. The electrical contractors can never be the agent of the principal employer because if such a relationship is permitted it would obliterate the distinction between the two and violate the provisions of the Act as well as the contractual principle that a contractor and a contractee cannot be the same person. Therefore the employees of the contractor are not covered by the definition under Section 2(9) of the Act.

Royal Talkies, Hyderabad v. *E.S.I. Corporation*,[1] is an important decision of the Supreme Court explaining the meaning of the term "employee" under the Act. In this case a cinema theatre manager, who had no statutory obligation to run a canteen or provide a cycle stand but, for the better amenities of his customers and improvement of his business, entered into an arrangement with another to maintain a canteen and a cycle stand and that other employed, on his own, workers in connection with the canteen and the cycle stand. It was held that the persons so employed are employees of the cinema theatre. They were covered by the definition of employee because under Section 2(9) any one who is employed "in connection with the work of an establishment" is an employee provided that such an employee works on the premises of establishment, or under the supervision of the principal employer or his agent "on work which is ordinarily part of the work of the establishment or which is preliminary to the work carried on or incidental to the purpose of the establishment." However some nexus must exist between the establishment and the work of the employee, although it may be a loose connection. Such work should not be extraneous or contrary to the purpose of the establishment but need not be integral to it either. Here the two operations namely, keeping a cycle-stand and running a canteen are incidental or adjuncts to the primary purpose of the theatre. An establishment like a cinema theatre is not bound to run a canteen or keep a cycle-stand nevertheless such activities have connection with the cinema theatre and even further the revenue.

In *Sri Naraksaritrakshan Ltd., and others* v. *E.S.I. Corporation*,[2] a newspaper establishment printing and publishing a newspaper was owning a factory wherein printing of newspapers was done. The question was whether employees working in administrative and editorial section of newspaper factory could be regarded as employees within the meaning of the Employees' State Insurance Act. The Supreme Court held them to be employees under the Act because they are directly employed by the management on work incidental or preliminary or connected with the work of the factory. A printing press established for the publication of a newspaper cannot

1. AIR 1978 SC 1478 : (1978) 2 LLJ 390 (SC).
2. (1985) 1 LLJ 1 (SC).

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effectively function at all without the service of the members of the editorial staff being made available almost till the time the newspaper comes out of the printing machines and the words "includes any person employed for wages on any work connected with the administration of the factory" in Section 2(9)(i) covers the administrative staff also.

Whether partner of a firm may be an employee.—Where a manager employed by the firm to manage the affairs of the firm and the managing partners have not been taking active part in the running of the business of the firm, the burden of proof is on the firm to prove that the managing partner is rendering services to the firm within its premises and should, therefore, be treated as an employee. Unless it is proved, the managing partner cannot be said to be an employee of the factory.[1]

The position of a partner in a firm was examined by the Supreme Court recently. It was held that the status of a partner in the firm is different from employees working under the firm. A partner is not an employee notwithstanding the fact that he is being paid some remuneration for any special attention which he devotes to the firm.[2]

(10) Exempted employee.—An exempted employee is one who is not liable under the Act to pay the employees' contribution to the fund.

(11) Family.—As defined in Section 2(11) "family" means all or any of the following relatives of an insured person, namely :

(i) a spouse ;

(ii) a minor legitimate or adopted child dependent upon the insured person ;

(iii) a child who is wholly dependent on the earnings of the insured person and who is—

(a) receiving education, till he or she attains the age of twenty one years ;

(b) an unmarried daughter :

(iv) a child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person, so long as the infirmity continues ;

(v) dependent parents.

(12) Factory.—"Factory" means any premises including the precincts thereof :

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on.

But the following are not a factory :

1. a mine subject to the operation of the Mines Act, 1952, or
2. a railway running shed.

It was held in *The Proprietor, M/s. Balasaraswathi Motor Works, Tirunelvell Jn.* v. *E.S.I. Corporation*,[3] that apprentices paid or unpaid would be included as person working inside a factory, while, taking into account the numerical strength of the factory under sub-section (12) of Section 2".

It was held in *E.S.I.C. Madras* v. *Christian Medical College Hospital, Vellore*[4] that the Equipment Maintenance Department is a vital part of the hospital which is a limb

1. *E.S.I.C.* v. *Pioneer Laundry*, (1966) 2 LLJ 527.
2. *E.S.I.C. Trichur* v. *Ramanuj Math Industries*, (1985) 1 LLJ 69 (SC).
3. (1970) 2 MLJ 403.
4. (1995) 1 LLJ 289 (Madras).

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of the Medical College and therefore it is not a factory. This department intended for maintaining machinery in a proper form cannot be separted from the main institution whose primary and paramount character is teaching medicine to students. This department intended for proper functioning of the main institution cannot be considered to be a factory even assuming some manufacturing process is carried on there.

Premises and Precincts.—Premises means buildings as well as land. The expression 'premises including precincts' merely shows that there may be some premises within precincts and some premises without precincts and does not exclude land.[1] The term precincts is usually understood as a space enclosed by walls.[2] Precincts is a relative word and is really an adjunct of a premises. Premises indicates the main building and its appurtenances. But merely enclosing a part of the premises of any establishment where 20 persons are employed with boundary walls and locating the place where power for the manufacturing process of the establishment is utilised just outside or adjoining land, may not be sufficient to take the establishment out of the definition of factory if all other conditions are satisfied.[3] Premises need not consist of building and they mean something different from buildings.[4]

Manufacturing process.—This expression is defined in the Factories Act, 1948. Manufacturing process is a very wide term. It merely refers to the particular business carried on and does not necessarily refer to the production of some article. As defined by the Factories Act, manufacturing process means any process for :

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal ; or

(ii) pumping oil, water or sewage ; or

(iii) generating, transforming or transmitting power ; or

(iv) composing types for printing, by letter press, lithography, photogravure or other similar process or book binding ; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels.

In *E.S.I.C. Bombay* v. *Vyankatesh Co-op. Processors Society Ltd. & another*,[5] the society was engaged in bleaching, dyeing and mercerising of grey-cloth. Water used for this is not brought in by employment of power. Power was used for treating the effluent before discharging it into Krishna river. This was because of provisions of Pollution Act. No power is used in manufacturing work of the society. It was held that there being no nexus between the manufacturing activity and the treatment and eventual discharge of the effluent, the use of power was not for any manufacturing process of the factory of Society.

In *Employees' State Insurance Corporation* v. *Bhag Singh*,[6] M/s National Service and Petrol Pump was a proprietory concern of respondent Bhag Singh. It was pleaded that the respondent was running two independent businesses, one of sale of petrol and the other of running of service station for repair of motor cars. The number of employees in each of them separately were less than10 and when taken together were less than 20. The two businesses were not dependent on each other. Moreover no manufacturing process was being carried on with the aid of power and as such the Act

1. *State* v. *Ardeshir*, AIR 1956 Bom 219.
2. *K.V.V. Sharma* v. *State*, AIR 1953 Mad 269.
3. *Mohammad Haneef & Co.* v. *Regional Director E.S.I. Corporation*, AIR 1969 Mad 155.
4. *Bhiwandiwala* v. *State of Bombay*, (1961) 2 LLJ 77.
5. (1993) 2 LLJ 394 (Bom).
6. (1993) 2 LLJ 126 (P. & H).

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cannot be made applicable. It was held that petrol pump and service station is work place wherein manufacturing process is carried on. Manufacturing process is not confined to bringing into existence commercially different product. It includes bringing about a particular result. The words 'pumping oil' used in clause (ii) of Section 2(k) of the Factories Act are not confined to pumping of oil from refineries but would also include pumping process involved in a petrol pump.

In *Osmania University* v. *Regional Director, E.S.I.C. Andhra Pradesh*,[1] the question was whether the provisions of Employees' State Insurance Act, 1948 are applicable in respect of the employees working in the Department of Publications and Press of the Osmania University. It was held that the said Department is engaged in the printing of text books, journals, forms, stationary and other items and the activities are a manufacturing process and therefore 'factory' within the meaning of Section 2(12) of the Act justifying the application of the Act.

In *East West Hotels Ltd.* v. *Regional Director E.S.I.C.*[2] it was held that in a kitchen attached to a hotel the articles of food undergo a change which is a process for adapting or treating such articles with a view to use or sale and hence it is engaged in manufacturing process. Therefore an establishment like a Hotel is a factory for the purposes of Employees' State Insurance Act, subject to the other conditions being satisfied.

The cricket club of India was preparing and selling food and beverages for sale to its members and their guests. In *Cricket Club of India Ltd. & others* v. *E.S.I.C. & Another*,[3] the above activity of the club was held to be a manufacturing process. The club was therefore a factory and hence was covered by the Employees' State Insurance Act.

In *Bangalore Club* v. *Regional Director E.S.I.C.*[4], catering section of the club was held to be a factory as the definition of manufacturing process is wide enough to cover preparation of food stuffs. The fact that restaurant section is run only for the benefit of its members with no profit motive will not take it out of the purview of the Employees' State Insurance Act. But the employees engaged in other sections of the club are not covered by the Act even though other activities of the club are carried on in the same compound where catering section is located. Catering activity may be incidental to other activites but activities of the club in respect of other sections cannot be said to be incidental to the catering section.

Power.—'Power' as defined in the Factories Act means electrical energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency. The question whether the manufacturing process is carried on with the aid of power is ultimately one of inference from facts. The test is not whether power is necessary for the manufacturing process but whether in fact power is used in the manufacturing process.[5] In case of a tannery the mere use of power for pumping water which is used for the subsequent manufacturing purposes cannot be described as the use of power in the manufacturing process so as to bring the tannery within definition of 'factory' under the Act.[6] The mere existence of pumpset worked by power cannot make th premises a factory. The essential postulate is that power must be used in aid of the manufacturing process in the premises.[7]

1. (1986) 1 Lab LJ 136 (SC).
2. (1986) 1 Lab LJ 172 (Karn).
3. (1993) 1 LLJ 642 (Bom).
4. (1994) 2 LLJ 780 (Karn).
5. *Mohammad Haneef & Co.* v. *Regional Director E.S.I. Corporation*, AIR 1969 Mad 155.
6. *Ibid.*
7. *Ibid.*

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What is a Factory ?—The essential requisites of a 'factory' under the Act are : (1) a premises, a geographical area within a certain boundary : (2) in a part of which manufacturing process should be carried on with the aid of power ; and (3) ten or more persons must be employed where manufacturing process is carried on with the aid of power and twenty or more persons must be employed where manufacturing process is carried on without the aid of power. Therefore "where various units of a Company engaged in the construction of piers at a certain place, were not within one compound and the site where the piers were being constructed was not located in a part of the compound in which the other units were located ; the location of different units cannot be said to be within a geographical limit so as to constitute a premises and thus merely because the workshop was carried on with the aid of power it cannot be said that the entire area constituted factory".[1] It is not necessary that the premises, should be a single building. A number of buildings when situate within one compound may constitute a factory. Therefore, unless it is possible to say that the different units are part of the same premises, the entire area cannot be regarded as a factory".[2] In *Employees' State Insurance Corporation* v. *S.M. Suiramul Naidu*,[3] it was contended that a "studio" is not a factory. It was held that though there were several departments functioning as separate entities or units within the studio it can still be called a factory. In another case it was argued on behalf of the Usha Prints that special contractor who did ironing for Usha Prints did ironing for many others also and therefore it cannot be regarded as a department of Usha Prints. But repelling this contention their Lordships of the Bombay High Court held that—

> "For many reasons in a large number of factories contractors are employed to do certain portion of the work but they are directly under the supervision of the managers of the factory. Therefore, unless the contrary is proved that the contractor was independent, the inference must neccessarily be that the ironing department is part and parcel of the Usha Prints".[4]

On certain premises the manufacturing process of tanning is being carried on with manual labour. The water which is used for subsequent manufacturing process was being pumped with the aid of power from a well situated outside tannery premises. It was held that "the mere fact that the water utilised has been pumped by electricity will not connect the pumping with the manufacturing process. There must be certain interlinking in the functioning of the pump with the manufacturing process carried on in the factory".[5] Therefore, the manufacturing process of tannery not being carried on with the aid of power, does not fall within the scope of definition of factory under the Act.

In *Gateway Auto Services* v. *Regional Directory, E.S.I.C.*[6] there were two departments in the establishment of the appellant, namely : (1) Service Station ; and (2) petrol pump, under his direct control and supervision. It was held that in order to fall within the definition of 'factory' the main activity must be connected with or must be identical part of activities carried on with the aid of power. Viewed in this light the establishment was held to be a factory.

(13) Immediate Employer.—Immediate Employer in relation to employees employed by or through him, means :

(1) a person who has undertaken to execute work in the premises of a factory

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1. *Hindustan Corporation Co. Ltd.* v. *E.S.I. Corporation*, 1969 Lab IC 769 (Assam).
2. *Ibid.*
3. (1960) 2 LLJ 699.
4. *Usha Prints (India)* v. *E.S.I. Corporation*, AIR 1964 Bom 94.
5. *Mohammad Haneef and Co.* v. *The Regional Director, E.S.I. Corporation*, AIR 1969 Mad 155 ; *See* also *Messrs, Sevamy and Co.* v. *E.S.I. Corporation*, (1972) 2 MLJ 232.
6. (1980) 2 LLJ 255 (Bom).

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or establishment to which this Act applies ; or

(2) who has undertaken to execute some work under the supervision of the principal employer or his agent ;

(3) that the work undertaken must be either in whole or in part of any work—

(a) which is ordinarily part of the work of the factoy or establishment of the principal employer ; or

(b) which is preliminary to the work carried on in, or incidental to, the purpose of, any such factory or establishment.

Immediate employer also includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer. Immediate employer also includes a contractor.

The place of work of the immediate employer is limited to the premises of the factory. If the work is to be executed somewhere else, the employer of such person shall not be an 'immediate employer' under the Act. The distribution or transport of an article after it is manufactured is not a manufacturing process and cannot be said to be incidental to or connected with the manufacturing process.[1]

(13-A) Insurable Employment.—The expression 'Insurable Employment' means an employment in any factory or establishment to which this Act applies.

(14) Insured person.—This definition has the following ingredients :

(1) any person who is or was an employee in respect of whom contributions are or were payable under this Act ; and

(2) any person who is entitled to any of the benefits provided by this Act.

(14-A) Managing Agent.—Managing Agent means :

(1) any person appointed as representative of another person ; or

(2) any person acting as representative of another person ; or

(3) he must be acting for the purpose of carrying on such other person's trade or business.

But an individual manager subordinate to an employer is a Managing Agent.

(14-AA) Manufacturing Process.—Manufacturing process shall have the meaning assigned to it in the Factories Act, 1948.

It was held in *Dessai Metal Works* v. *E.S.I.C. & Another*,[2] that bringing boulders from one place and crushing them into various smaller sizes with a view to its use and sale amounts to manufacturing process.

In *Employees State Insurance Corporation* v. *Tiecicon Private Limited*[3] it was held that the company which is providing aircooling facilities to the tenants in the building on payment of charges and by engaging more than 10 persons is an establishment or is a factory for the purpose of coverage under the Employees' State Insurance Act. The air is adapted or treated with a mechanical process with the aid of power for being used in the form of giving cool air to customers on payment of charges. This amounts to manufacturing process.

In *G.L. Hotels Ltd. etc.* v. *T.C. Sarin & another*,[4] it was held that lodging and boarding are both essential components of the services rendered by the hotel. Hence it cannot be denied that the activity in kitchen has a connection with the activities carried on in the rest of the hotel premises. Manufacturing activity is carried on in the kitchen and kitchen is an integral part of the hotel. The manufacturing activity has a broad connection with the activities carried an in the rest of the premises. Therefore the Act

1. *R. Jageshar* v. *Bombay Gas Co.* (1961) 1 LLJ 38.
2. (1993) 1 LLJ 1085 (Bombay).
3. (1996) LLJ 304 (Bom).
4. (1994) 2 LLJ 883 (SC).

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applies to hotel and other activities carried on in hotel.

(14-B) Miscarriage.—The expression 'miscarriage' means expulsion of the contents of a pregnant uterus at any period prior to or during the twenty-six-weeks of pregnancy. But any miscarriage the causing of which is punishable under the Indian Penal Code shall not be covered by this definition.

(15) Occupier.—Section 2(15) provides that the occupier of the factory shall have the meaning assigned to it in the Factories Act, 1948. The Factories Act defines occupier as follows :

> "Occupier of a factory means the person who has ultimate control over the affairs of the factory and where the said affairs are entruested Managing Agent, such agent shall be deemed to be occupier of the factory".

The occupier means :

(1) any person who has ultimate control over the affairs of the factory ; or

(2) the Managing Agent, where the affairs of the factory are entrusted to him.

Any person who has the right of regulating and controlling the factory or who is in the predominant position and exercises general superintendence over it, is an occupier.[1] He may be the owner, a lessee, or a licensee, but he must have a right to occupy the property and dictate how it is to be managed.[2] The manager of a factory is not a Managing Agent and cannot be deemed to be the occupier of the factory. An occupier of a factory may be an individual, a firm or other association of individuals.

(15-A) Permanent Partial disablement.—The definition given in the Act has the following ingredients :

(1) partial disablement must be of a permanent nature ;

(2) the disablement must reduce the earning capacity of an employee ;

(3) reduction of earning capacity must be in every employment which he was capable of undertaking at the time of the accident resulting in the disablement.

What is permanent partial disablement is a question of fact. But every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement. The test to determine permanent partial disablement has been discussed in detail in the Workmen's Compensation Act.

The Courts have to see that the earning capacity of the workman has been reduced in every employment which he was capable of undertaking at the time of accident and not merely the particular employment in which he was engaged at the time of accident resulting in disablement. The liability of the employer is not limited to cases of incapacity to work but it extends to incapacity for work. If an injury to a workman caused by an accident did not reduce his capacity to work but stamped him with such a marked physical deficiency as would dissuade the likely employers from employing him, he would be deemed incapacitated for work in the sense that his earning capacity would clearly be altogether destroyed.[3]

(15-B) Permanent total disablement.—The definition contains the following ingredients :

(1) the disablement resulting from injury must be permanent ; and

(2) the disablement must be of such a nature as renders the workman incapable for all work which he was capable of performing at the time of accident resulting in such disablement ; and

(3) every injury specified in Part I of Schedule II shall be deemed to result in

1. *Emperor* v. *Taylor*, 10 Bom LR 38.
2. *Public Prosecutor* v. *Pappanna*, (1942) 1 MLJ 104.
3. *Bell* v. *William Hunt and Sons Ltd.*, 1912 AC 496.

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permanent total disablement ; and

(4) it shall also be deemed to result from any combination of injuries specified in Part II of Second Scheedule where the aggregate percentage of the loss of earning capacity, as specified against those injuries, amounts to one hundred per cent or more.

In this case also 'incapacity for work' is not the same thing as 'incapacity to work'. There is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him.[1] The disablement is said to be permanent and total if it results in such permanent loss of earning capacity of the employee as makes him incapable for all work which he was capable of doing at the time of accident. But if the disablement results only in the reduction of the earning capacity it is only partial, not total disablement. The use of preposition 'for' makes it sufficient clear that the 'incapacity for work' as referred thereto is not merely physical incapacity to work but incapacity to secure employment. Therefore, whatever may be the physical power of the employee to do a duty in any sphere of activity if there is no earning power remaining in the workman so as to persuade an employer to offer him any employment, the incapacity is complete.[2]

(15-C) Power.—"Power" shall have the meaning assigned to it in the Factories Act, 1948.

(16) Prescribed.—'Prescribed' means, prescribed by rules made under this Act.

(17) Principal employer.—The Act provides the definition of principal employer separately in relation to a factory, an establishment under the control of any department of Government of India ; and any other establishment.

In relation to a factory, principal employer means :

(1) owner or occupier of the factory ; or

(2) managing agent of the owner or occupier ; or

(3) the legal representative of the deceased owner or occupier ; or

(4) the manager so named under the Factories Act.

In relation to an establishment, under the control of any department of any Government in India, principal employer means :

(1) Head of the department, where no authority is appointed by the Government ; or

(2) the authority appointed by such Government in this behalf.

In any other establishment, principal employer means any person responsible for the supervision and control of the establishment.

In *Royal Talkies Hyderabad* v. *E.S.I. Corporation*,[3] the Cinema Manager had entered into an arrangement with another to maintain a canteen and a cycle-stand, and that other employed on his own workers in connection with the canteen and the cycle-stand. It was held that the cinema manager was the principal employer of the persons employed by the contractor to run the canteen and the cycle-stand.

In *Suresh Tulsidas Kailashchand and others* v. *Collector of Bombay and others*,[4] the question was whether the directors of a Public Limited Company are principal employers within the meaning of Section 2(17) of the E.S.I. Act, 1948. It was held by the Bombay High Court that while it is true that the general body of share holders have ultimate control of the Company, it cannot be disputed that the Board of Directors have

1. *Rukiyabai* v. *George D'Cruz*, AIR 1961 Kerala 108.
2. *Canara Public Conveyance Co.* v. *Usman Khan*, (1966) 1 LLJ 831 (Mys).
3. AIR 1978 SC 1478.
4. (1980) 2 LLJ 81 (Bom) ; *See* also *B.M. Chatterjee* v. *State of West Bengal*, AIR 1970 Cal. 290.

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got the ultimate control over the day-to-day affairs of the Company. The liability to contribute the amount under Section 40 of the Act is part of day-to-day working of the Company and it is not possible to hold that in respect of payment of contribution the Directors have no ultimate control over the affairs of the Company. Therefore, the petitioners Directors did have the ultimate control over the affairs of the Company and would clearly come within the expression "occupier" and consequently the "principal employer" under Section 2(17) of the Act.

It was held in *E.S.I. Corpn., Chandigarh* v. *Gurdial Singh & others*,[1] that Directors of a private Limited Company are not personally liable to meet the demand of contribution under the Act. The liability was of the Company and in the event of being an occupier, he was liable to meet the demand and not the directors.

But the Calcutta High Court in *E.S.I.C.* v. *Smt. ichraj Devi Chopra and others*,[2] held that where there is no managing director who can be said to be managing the affairs of the factory and in ultimate control over the affairs of the factory, none of the directors can be regarded as the principal employer within the meaning of Section 2(17) of the Act.

In *Vinay Mehra* v. *Employees' State Insurance Corporation*[3] a Chartered Accountant who worked as accounts consultant of several firms was prosecuted for not filing the returns of contributions under the Employees' State Insurance Act. It was held that the petitioner who is merely an accounts consultant and who is neither the occupier nor the manager of the factory, cannot be termed as the principal employer of the company.

It was held in *Employees' State Insurance Corporation* v. *S.K. Aggarwal*,[4] that the Directors of the company, would not be covered by the definition of 'principal employer' when the company itself owns the factory and is also the employer of its employees at the head-office.

In *Kirloskar Brothers Ltd.* v. *Employees' State Insurance Corporation*,[5] the registered office of the appellant company was at Poona for sale and distribution of its products from three factories situated in Maharashtra and Madhya Pradesh. They set up regional offices at several places including Secunderabad in Andhra Pradesh and Bangalore in Karnataka. These Governments applied the Act to the above two regional offices and the respondent demanded contribution to health insurance. It was held that the true test to find out the applicability of the Act to regional offices is the control by the principal employer over the employee. The test of predominant business activity or too remote connection are not relevant. The employee need not necessarily be the one integrally or predominantly connected with he entire business or trading activities. In interpreting the provisions of the Act, they must be read in the light not only of the objects of the Act but also the constitutional, fundamental and human rights. Thus the appellant was held liable to pay contribution.

(18) Regulation.—Regulation means a regulation made by the Corporation.

(19) Schedule.—Schedule means a schedule to this Act.

(19-A) Seasonal Factory.—"Seasonal Factory" means a Factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar, (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year—

(a) in any process of blending, packing or repacking of tea or coffee ; or

(b) in such other manufacturing process as the Central Government may, by notification in the official Gazette, specify.

1. (1991) 2 Lab LJ 425 (SC).
2. (1992) 2 Lab LJ 132 (Cal).
3. (1995) 1 LLJ 488 (P & H).
4. AIR 1998 SC 2676.
5. (1996) 1 LLJ 1156 (SC).

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In *E.S.I.C. Bangalore* v. *Brooke Bond India Ltd.*,[1] it was contended that the Brooke Bond India Ltd., were engaged in manufacturing process of Coffee and were, therefore, a seasonal factory. But the corporation resisted their claim on the ground that the factory was working throughout the year and not only for 7 months or less. It was held that the factory falls within the original definition of seasonal factory. The inclusive definition is not attracted because it is not a case of the factory merely, obtaining the manufactured coffee and packing it for sale.

(20) Sickness.—Sickness means a condition which requires medical treatment and attendance and necessitates abstention from work on medical grounds.

(21) Temporary Disablement.—Ingredients of this definition are as follows :

(1) It is a condition resulting from an employment injury ; and

(2) The injury must be such as requires medical treatment ; and

(3) The injury must render the employee temporarily incapable of doing the work ; and

(4) The incapacity to work must be with regard to such work which the employee was doing either prior to injury or at the time of injury resulting in such disablement.

(22) Wages.—The definition of wages as given in the Act is an exhaustive one. It is both inclusive and exclusive. Wages means :

(1) all remuneration paid or payable in cash, provided that the terms of employment express or implied are fulfilled ; and

(2) any payment to an employee in respect of any period of—

(a) authorised leave ;

(b) lock-out or strike which is not illegal ;

(c) lay-off ; and

(3) other additional remuneration if any, paid at intervals not exceeding two months.

Any right to wages arises out of a contract express or implied. The term of contract must also be fulfilled to support any claim for wages.

The following are not wages :

(1) any contribution paid by the employer to any pension fund or provident fund ;

(2) any contribution paid by the employer under this Act ;

(3) any travelling allowance or the value of any travelling concession ;

(4) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment ; or

(5) any gratuity payable on discharge.

Additional remuneration paid to a worker as reward for work is wages under this Act.[2] Where a person was employee under several employers and any one of them was deducting contribution by arrangement with other employers it was held that the "reckonable earnings could not be the total remuneration".[3]

In *E.S.I.C. Hyderabad* v. *A.P. Paper Mills*[4] it was held that incentive bonus paid by the company to its workmen under the settlement constitutes wages. In order to determine whether incentive bonus and production bonus form part of wages or not, the scheme under which it is paid must be examined and it must be ascertained whether

1. (1982) 2 LLJ 395 (Karn).
2. *Sharma R.L.* v. *E.S.I. Corporation*, 1969 Lab IC 237 (Punj).
3. *Baker* v. *Minister of Social Security*, 1969 Lab IC 1438 (Eng).
4. AIR 1978 AP 18.

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bonus paid is part of the terms of the contract of employment or whether it is an additional remuneration within the meaning of the third part of Section 2(22) of the Act. If it does not fall either in the category of Part I or Part III then it is not wages. If the bonus is paid at the discretion of the employer and can be withdrawn at any time then also it would not be wages. Similarly, house rent allowance, paid every month under the settlement forming part of contract of employment would be wages within the meaning of Part I of Section 2(22).

In *Reyrolle Burn Limited* v. *E.S.I.C.*,[1] it was held that incentive bonus payable to workmen in terms of the tripartite agreement binding upon the parties is covered by the definition of wages. Such an incentive bonus has become one of the terms of employment within the scope of the first part of the definition of wages. Such a bonus is payable as a part of the contract of employment and its payment may also be considered as "other additional remuneration within the meaning of the third party of the definition of wages".

In *Deccan Chronicle* v. *E.S.I.C. Hyderabad*,[2] the management and the employees have entered into an agreement providing for payment of quarterly allowance. Thus the management is bound, as a matter of statutory obligation, to pay to the employees the quarterly special allowance. This payment is part of the contract entered into between the management and the employees and sanctioned by law. The fact that the parties of the agreement have decided not to treat this allowance as wages cannot exclude the operation of the Act. Therefore, quarterly allowance is wages and is liable to be counted for the purposes of making contributions under the Act.

Where as a result of settlement, a production-cum-attendance bonus is paid quarterly it would come within the first part of the definition of wages and the employer will be liable to pay his contribution.[3]

In *Wellman (India) Pvt. Ltd.* v. *E.S.I. Corpn*,[4] the employer was making payment of quarterly attendance bonus under a settlement reached before conciliation officer. It was held that the attendance bonus has become part of the contract of employment. Hence the said bonus will fall within the first part of the definition of wages.

It was held in *M/s. Shouris Duplicators Pvt. Ltd. & others* v. *E.S.I.C.*[5] that if additional remuneration, other than the one payable under contract of employment, is paid at intervals not exceeding two months it becomes wages by virtue of the latter part of the definition of "wages" under Section 2(22). Therefore viewed in this light *production bonus* which the management had paid to the employees at intervals not exceeding two months will fall within the definition of wages.

In *Regional Director, E.S.I.C. Ahmedabad* v. *New Asarwa Mfg. Co. Ltd.*,[6] the question was whether payment made to an employee towards paid holiday is remuneration within the meaning of Section 2(22). It was held that remuneration means payment for services rendered or to be rendered by the employee. On a paid holiday the employee cannot render any services and the employer cannot take any service from the employee. Paid holiday is a holiday which cannot be substituted for another holiday and under the terms of the contract the parties agree that on that day no services would be rendered and no services would be taken and yet payment would be made. That payment cannot be considered remuneration and so is not wages within the meaning of Section 2(22).

1. (1980) 1 LLJ 30 (Calcutta).
2. (1980) 2 LLJ 474.
3. *Regional Director, E.S.I.C.* v. *Bombay Metal & Alloys Mfg. Co.*, (1979) 1 LLJ 323 (Bom).
4. (1994) 1 LLJ 545 (SC).
5. (1992) 2 Lab LJ 443 (Delhi).
6. (1981) 2 LLJ 141.

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Following the decision of the Supreme Court in *Employees' State Insurance Corpn.* v. *Model Mills Nagpur Ltd.*,[1] it was held in *Employees' State Insurance Corpn.* v. *Malabar Cashewnut & Allied Products & others*,[2] that wages paid for National Holidays under the Holidays Act is not remuneration paid or payable and will not form part of wages as defined by the E.S.I. Act.

Subsistence allowance given to a suspended employee is not a remuneration paid for services rendered and so is not wages under the Act.[3]

It was held in *Regional Director, E.S.I.C.* v. *P.B. Gupta*[4] that the remuneration paid to an employee on account of overtime work does not come within the definition of wages in Section 2(22) and therefore it cannot be taken into account for determining the liability of the employer under the Act. Overtime is not a remuneration payable under a contract between the employer and the employee.

In *Regional Director E.S.I.C. Madras* v. *M.M. Rubber Co. (P) Ltd.*,[5] it was held that the production bonus paid to the employees in accordance with a settlement was covered by the definition of wages. Bonus is included in the wages when the amount payable is capable of being demanded as a matter of right. Where bonus is payable in consequence of an agreement the employer cannot withdraw from the agreement at his will.

Similarly in *E.S.I.C.* v. *Amalgamation Repco Limited, Madras*,[6] incentive bonus payable to all workmen in pursuance of a scheme was held to be wages. Here incentive bonus was payable in pursuance to an agreed scheme. In this scheme it was provided that in case of change in terms or the scheme and payment having been made on the basis, such payment will become part of the contract of employment. The management has no right to withdraw the scheme or substitute any alternative scheme. It was further held that in view of the fact that night shift allowance is payable in pursuance of the agreement, it also falls within the definition of wages.[7]

In *Regional Director, E.S.I.C., Patna* v. *Bata Shoe Company*,[8] the question for consideration was whether good attendance bonus paid to employees one month after each quarter was 'wages' within the meaning of Section 2(22) of the Act. This extra bonus was agreed to be paid at a certain percentage of annual salary of the workman. It was held that the attendance bonus is an *ex gratia* payment and is paid as a gesture of goodwill. It is neither production bonus nor customary bonus nor any statutory bonus. Bonus paid under successive settlements and agreements cannot be regarded as a remuneration paid or payable to the employees in fulfilment of the terms of contract of employment. When wages fall short of living wages and when industry makes huge profits part of which are due to the contribution which the workmen made in increasing production the demand for bonus becomes an industrial claim. Since the principle underlying the payment of attendance bonus is different, it is not bonus and therefore cannot be included in the definition of 'wages' under the Act.

In *E.S.I.C.* v. *Management of Kirloskor Systems Ltd.*,[9] it was held that by no stretch of inference could it be said that subsistance allowance is remuneration paid to the employee for having fulfilled the terms of contract of employment. On the other

1. (1992) 80 FJR 81 (SC).
2. (1993) 1 LLJ 596 (Kerala).
3. *E.S.I. Corpn.* v. *Leela Karunakaran*, (1993) 1 LLJ 870 (Kerala).
4. (1994) 2 LLJ 19 (Orissa).
5. (1979) 2 LLJ 81 (Mad).
6. (1983) 2 LLJ 178 (Madras).
7. (1983) 2 LLJ 173 (Madras).
8. (1986) 1 LabLJ 138 (SC).
9. (1985) 1 LLJ 173 (Kar).

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hand, suspension is the result of misconduct for breach of contract and it would be a travesty to call subsistance allowance is remuneration. A subsistance allowance is not wages under Section 2(22). Since it is not wages, therefore, there is no question of contribution on the same because contribution is payable with reference to and in respect of average daily wages.

In *S.T. Reddiar and Sons.* v. *Regional Director*,[1] temporary workers were paid *ex gratia* for printing texts books ahead of the time schedule once in 1975 and again in 1976. It was held that additional remuneration even beyond contract of employment can be treated as wages only if such remuneration is paid at intervals of not more than two months. Gratuitous payments effected once in a year cannot fall within the definition of 'wages' under Section 2(22) of the Act. Therefore '*inam*' paid to temporary employees as *ex gratia* is not wages.

In *M/s. Graphite India Ltd.* v. *E.S.I. Corpn.*[2] it was held that *washing allowance* paid under the settlement, between employer and employees could be only for defraying the expenses of washing of dresses or clothes used by each of them when they attend the work. Such allowance is in the nature of special expenses entailed on employee by the nature of his employment and is therefore, not wages.

It was held in *Hind Art Press, Mangalore* v. *E.S.I. Corpn. and another*[3] that special allowance and *mid-day allowance* paid every month in terms of settlement would constitute wages.

(23) Wage period.—"Wage period" in relation to an employee means the period in respect of which wages are ordinarily payable to him whether in terms of the contract of employment, express or implied or otherwise.

(24) Expression not defined but used in the Act.—Section 2(24) of the Act provides that all such other words and expressions as are used but are not defined in this Act, shall have the meaning assigned to them in the Industrial Disputes Act, provided they are used and defined in that Act.

Section 2-A. Registration of factories and establishments.—Every factory or establishment to which this Act applies shall be registered within such time and in such manner as may be specified in the regulations made in this behalf.

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1. (1989) 2 Lab LJ 285 (Kerala).
2. (1992) 2 Lab LJ 125 (Karn).
3. (1990) 2 Lab LJ 195 (Karn).

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CHAPTER II
CORPORATION, STANDING COMMITTEE AND MEDICAL BENEFIT COUNCIL

Section 3. Establishment of Employee's State Insurance Corporation.—Section 3 of the Act provides that the Employees' State Insurance Corporation shall be established by the Central Government by notification in the Official Gazette. The Corporation shall be established with effect from such date as may be notified by the Government. The function of the Corporation is the administration of the Scheme of Employee's State Insurance in accordance with the provisions of this Act.

The following are main features of the Corporation :

(1) It shall be a *body corporate* by the name of Employees' State Insurance Corporation ;

(2) The Corporation shall have perpetual succession ;

(3) It shall also have a common seal ;

(4) It can sue and be sued in its own name.

The effect of declaring the Corporation as a body corporate is that it becomes a legal entity like an individual and any one who trust it, trusts that legal person and must look to its assets for any claim against it.[1] A decree or award made against the corporate body (*i.e.*, Corporation) is not enforceable against the individual members but only against the assets of the corporate body.[2]

Section 4. Constitution of Corporation.—The following office bearers and members shall constitute the Corporation :

(a) A Chairman to be appointed by the Central Government.

(b) A Vice-Chairman to be appointed by the Central Government.

(c) Not more than five persons to be appointed by the Central Government.

(d) One person each representing each of the States in which this Act is in force to be appointed by the State Government concerned.

(e) One person to be appointed by the Central Government to represent the Union Territories.

(f) Ten persons representing employers to be appointed by the Central Government in consultation with such organisations of employers as may be recognised for the purpose, by the Central Government.

(g) Ten persons representing employers to be appointed by the Central Government in consultation with such organisations of employees as may be recognised for the purpose, by the Central Government.

(h) Two persons representing the medical profession to be appointed by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government.

(i) Two members of the House of the People (Lok Sabha) elected by the members of that House, and one member of the Council of State (Rajya Sabha) elected by the members of that house.

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1. *Jhansi Co-operative Oil Mills* v. *Makhan Lal*, AIR 1975 All 492.
2. AIR 1931 Pat 32.

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(j) The Director General of the Corporation shall be *ex-officio* member of the Corporation.

Insurance Medical Officer under Employees' State Insurance Scheme is not an employee of the State Government.[1]

Section 5. Term of office of members of the Corporation.—Chairman, Vice-Chairman, representatives of the Central Government, Union Territories and of State Governments shall hold office during the pleasure of the Government appointing them.

Representatives of the employers, employees, medical profession and Parliament shall hold office for a period of four years commencing from the date on which their appointment or election is notified. But they shall, even after the expiry of their tenure, continue to hold office until the appointment or election of their successors is notified.

Section 6. Eligibility for re-appointment or re-election.—An outgoing member of the following bodies shall be eligible for re-appointment or re-election as the case may be :

(1) Employees' State Insurance Corporation.
(2) Standing Committee.
(3) Medical Benefit Council.

Section 7. Authentication of orders, decisions etc.—Section 7 of the Act provides for authentication of the orders and decisions made by the Corporation. The Director-General of the Corporation shall be the proper authority to authenticate any orders and decisions of the Corporation. Any other instrument issued by the Corporation shall be authenticated either by the signature of the Director General or any other officer of the Corporation authorised in that behalf by the Director General of the Corporation.

Section 8. Constitution of Standing Committee.—The Standing Committee shall be constituted from amongst the members of the Corporation. It shall consist of the following office bearers :

(1) The following members and office-bearers shall be appointed by the Central Government—
  (a) Chairman,
  (b) Three members of the Corporation,
(2) Three members of the Corporation representing such three State Governments as the Central Government may, by notification in the official Gazette, specify from time to time.
(3) The Director-General of the Corporation shall be *ex-officio* member of the Standing Committee.
(4) The following eight members shall be elected by the Corporation :
  (a) three members from among the members of the Corporation representing the employers ;
  (b) three members from among the members of the Corporation representing the employees ;
  (c) one member from among the members of the Corporation representing the medical profession, and
  (d) one member from among the members of the Corporation elected by the Parliament.

Section 9. Terms of office of members of Standing Committee.—The Chairman, three members of the Corporation appointed by the Central Government and three members of the Corporation representing States shall hold office during the pleasure of the Central Government. All the eight members elected by the Corporation shall hold

1. *Nonigopal v. State of West Bengal*, AIR 1970 Cal 1.

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office for a period of two years from the date on which their election is notified :

Provided that any member of the Standing Committee shall continue to hold office even after the expiry of his tenure of two years until the election of his successor is notified. But any member of the Standing Committee shall cease to hold office the day he ceases to be a member of the Corporation.

Section 10. Medical Benefit Council.—Section 10 of the Act provides for the constitution of a Medical Benefit Council by the Central Government. The Medical Benefit Council shall consist of the following members and office-bearers :

1. The Director General Health Services shall be *ex-officio* Chairman.
2. The Medical Commissioner of the Corporation shall be *ex-officio* member of the Council.
3. The following appointments shall be made by the Central Government to the Medical Benefit Council :
   (a) a Deputy Director-General, Health Services,
   (b) three members representing employers to be appointed in consultation with such organisations of employers as may be recognised for the purpose by the Central Government,
   (c) three members representing employees to be appointed in consultation with such organisations of employees as may be recognised for the purpose by the Central Government,
   (d) three members representing the medical profession to be appointed in consultation with such organisations of medical practitioners as may be recognised for the purpose, by the Central Government. No less than one of these members shall be a woman.
4. One representative from every State, other than the Union Territories, in which this Act is in force shall be appointed by the State Government concerned.

Tenure of the members of the Medical Benefit Council.—According to Section 10(2) the representatives of employers, employees and medical profession in the Medical Benefit Council, shall hold office for a period of four years from the date on which their appointment is notified. Any such member of the Medical Benefit Council, shall continue to hold office even after the expiry of his term of four years until the appointment of his successors is notified. Section 10(3) provides that the Deputy Director General Health Services shall hold office during the pleasure of the Central Government. Representatives of State shall hold office during the pleasure of their respective State Government.

Section 11. Resignation of membership.—Any member of the following bodies may resign his office by notice in writing to the Central Government and the seat shall fall vacant only on acceptance of the resignation by the Government :

(1) Employees' State Insurance Corporation.
(2) Standing Committee.
(3) Medical Benefit Council.

Section 12. Cessation of Membership.—Section 12 of the Act deals with the cessation of membership of the Corporation, the Standing Committee, or the Medical Benefit Council. Any member who fails to attend three consecutive meetings shall cease his membership of Corporation, Standing Committee and the Medical Benefit Council. The said bodies, may subject to rules made by the Central Government, restore the membership of any member.

Any representative of the employers, employees or medical profession, in the Corporation, the Standing Committee or the Medical Benefit Council may be declared

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by the Central Government, to have ceased his membership if he has in the opinion of the Government ceased to represent his class. Any such declaration may be made by the Central Government by a Gazette notification and shall be effective from the date specified in the notification.

Any representative of Parliament to the Corporation shall cease to be its member when he ceases to be a member of Parliament.

Section 13. Disqualification.—Section 13 of the Act lays down disqualification for membership or election to the Corporation, the Standing Committee or the Medical Benefit Council. No person can be chosen as or continue to be member of the above bodies if :

1. he is declared to be of unsound mind by a competent court ; or
2. he is a discharged insolvent ; or
3. he has directly or indirectly any interest, in a subsisting contract with, or in any work being done for the Corporation. It is immaterial that he has such interest by himself or by his partner. But this rule shall not apply to a medical practitioner or a share-holder (not being a Director) of a company ; or
4. he has been convicted of an offence involving moral turpitude whether such conviction has been before or after the commencement of this Act.

The test for determining moral turpitude as laid down in *Mangali* v. *Chakkilal*[1] is 'whether the act leading to a conviction was such as could shock the moral conscience of the society in general whether the motive which led to the act was a base one and whether on account of the act having been committed the perpetrator could be considered to be a depraved character or a person who was to be looked down by the society.' Moral turpitude is clearly an ingredient of the offence, where it consists of an act of giving false information knowing it to be false in order to injure some one else.[2]

Section 14. Filling of vacancies.—Section 14 of the Act deals with the filling of vacancies in any office of the Corporation, the Standing Committee or the Medical Benefit Council. Any vacancy in the office of appointed or elected member shall be filled by appointment or election as the case may be and any such appointment or election to any office as aforesaid shall be made only for the remaining period of the full term of the member whose vacancy is filled.

Section 15. Fees and allowances.—Section 15 of the Act empowers the Central Government to prescribe fees and allowances of the members of the Corporation, the Standing Committee or the Medical Benefit Council.

Section 16. Principal Officers.—(1) The Central Government may, in consultation with the Corporation, appoint a Director General and a Financial Commissioner.

(2) The Director General shall be the Chief Executive Officer of the Corporation.

(3) The Director General and the Financial Commissioner shall be whole time Officers of the Corporation and shall not undertake any work unconnected with their office without the sanction of the Central Government and the Corporation.

(4) The Director General or the Financial Commissioner shall hold office for such period, not exceeding five years, as may be specified in the order appointing him. An outgoing Director General or Financial Commissioner shall be eligible for reappointment if he is otherwise qualified.

(5) Director General or Financial Commissioner shall receive such salary and allowances as may be prescribed by the Central Government.

1. AIR 1963 All 527.
2. *Sita Ram* v. *D.M. Pilibhit*, AIR 1957 All 383.

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(6) A person shall be disqualified from being appointed as or for being Director General or the Financial Commissioner if he is subject to any of the disqualification specified in Section 13.

(7) The Central Government may at any time, remove the Director General or the Financial Commissioner from office and shall do so if such removal is recommended by a resolution of the Corporation passed at a special meeting called for the purpose and supported by the votes of not less than two-thirds of the total strength of the Corporation.

The provision that the appointment shall be made by the Central Government in consultation with the Corporation is merely directory. The Central Government is not bound by the advice of the Corporation and failure to consult the Corporation does not make the appointment infructuous. The question, whether Principal Officers are government servants, has been discussed by the courts in a number of cases. In *Bibhuti Bhushan* v. *Damodar Valley Corporation*,[1] it was held that the Corporation was a statutory body and Article 311 of the Constitution did not apply.

Section 17. Staff.—(1) The Corporation may employ such other staff of officers and servants as may be necessary for efficient transaction of its business provided that the sanction of the Central Government shall be obtained for the creation of any post the maximum salary of which exceeds such salary as may be prescribed by the Central Government.

(2)(a) The method of recruitment, salary and allowances, discipline and other conditions of service of the members of the staff of the Corporation shall be such as may be specified in the regulations made by the Corporation in accordance with the rules and orders applicable to the officers and employees of the Central Government drawing corresponding scales of pay :

Provided that where the Corporation is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters aforesaid, it shall obtain the prior approval of the Central Government.

(b) In determining the corresponding scales of pay of the members of the staff under clause (a), the Corporation shall have regard to the educational qualifications, method of recruitment, duties and responsibilities of such officers and employees under the Central Government and in case of any doubt, the Corporation shall refer the matter to the Central Government whose decision thereon shall be final.

(3) Every appointment to posts (other than medical posts) corresponding Group A, and Group B, posts under the Central Government shall be made in consultation with the Union Public Service Commission :

Provided that this sub-section shall not apply to an officiating or temporary appointment for a period not exceeding one year :

Provided further that any such officiating or temporary appointment shall not confer any claim for regular appointment and the services rendered in that capacity shall not count towards seniority or minimum qualifying service specified in the regulations for promotion to next higher grade.

(4) If any question arises whether a post corresponding to Group A, and Group B post under the Central Government, the question shall be referred to that Government whose decision thereon shall be final.

Section 18. Powers of the Standing Committe.—The Standing Committee is constituted to administer the affairs of the Corporation. It has to function in accordance with the regulations framed by the Corporation. Its work and activities are controlled

1. AIR 1953 Cal 581 : Similar opinions have been expressed in *Damodar Valley Corporation* v. *Prabhat Roy*, 60 CWN 1023 and *Subodh Ranjan Ghosh* v. *Sindri Fertilizer and Chemicals Ltd.*, AIR 1957 Pat 10.

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and supervised by the Corporation. It has following powers :

(1) Power of administration of the Corporation, subject to the general superintendence and control of the Corporation.

(2) Subject to the general control of the Corporation it may exercise any of the powers and perform any of the function of the Corporation.

(3) It shall submit for consideration and decision of the Corporation all such cases and matters as may be specified in the regulations made in this behalf.

(4) The Standing Committee may in its discretion, submit any other case or matter for the decision of the Corporation.

Section 19. Corporation's Power to promote measures for health etc., of insured persons.—Section 19 of the Act empowers the Corporation to take steps for the benefit of insured persons. These measures permitted to be taken by the Corporation are in addition to any benefit scheme specified in this Act. These are as follows :

(1) The Corporation may promote measures for the improvement of the health and welfare of insured persons.

(2) It shall promote measures for the reabilitation and re-employment of insured persons who have been disabled or injured.

(3) The Corporation may incur expenses in respect of such measures from its funds. The limit of the expenditure shall be prescribed by Central Government.

Section 20. Meetings.—The Corporation, the Standing Committee and the Medical Benefit Council shall meet at such times and places as may be specified by the regulations made under the Act. These regulations shall also provide for the rules and procedure in regard to transaction of business at the meetings.

Section 21. Supersession of the Corporation and Standing Committee.—Section 21 of the Act empowers the Central Government to supersede the Corporation or the Standing Committee, on the following grounds :

(1) If in the opinion of the Central Government the Corporation or the Standing Committee, persistently makes default in performing the duties imposed on it by or under this Act ; or

(2) The Corporation or the Standing Committee abuses its powers.

The supersession of the Standing Committee is possible only in consultation with the Corporation. For any supersession a notification in the official Gazette has to be issued by the Central Government. The Central Government shall also, before making any such notification, give reasonable opportunity to the Corporation or the Standing Committee to explain their stand and consider any objections or explanations given by them. All the members of the Corporation or the Standing Committee shall be deemed to have vacated their offices from the date of the publication of the said notification. When the Standing Committee has been superseded a new Standing Committee shall immediately be constituted.

When the Corporation has been superseded, the Central Government may take the following action :

(1) It shall immediately appoint or cause to be appointed or elected new members to the Corporation. Then a new Standing Committee may be constituted.

(2) The Central Government may in its discretion appoint such agency to exercise the powers and perform the functions of the Corporation as it thinks fit. The appointment shall be for such period as the Central Government may decide. Any agent so appointed shall exercise all the powers and perform all the functions of the Corporation.

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A full report of the causes and circumstances necessitating the action and of action taken shall be, at the earliest possible opportunity, placed before the Parliament by the Central Government. Any such report shall be represented before the Parliament, not later than three months from the date of notification superseding the Corporation or the Standing Committee, as the case may be.

The supersession of the Standing Committee is possible only in consultation with the Corporation. Consultation is only directory and not mandatory. The word 'consultation' merely means that a certain statutory preliminary duty ought to be pefromed before the act is done.[1] What shall be the appropriate time to take action under this section, depends solely upon the subjective opinion of the Central Government. This section also makes it obligatory upon the Government to serve the Corporation or the Standing Committee with a show cause notice, which means the Government must indicate the evidence on the basis of which it has formed its opinion. Merely asking to show cause why the Standing Committee be not superseded would not be enough compliance of the provisions of the Act.[2] The Government must before taking action consider any explanation given or objections raised by the Corporation or the Standing Committee.

Section 22. Duties of Medical Benefit Council.—The Medical Benefit Council shall advise the Corporation and the Standing Committee on matters relating to the administration of medical benefit, the certification for purposes of the grant of beneifts and other connected matters.

The Medical Benefit Council shall have such powers and perform such duties of investigation as may be prescribed in relation to complaints against medical practitioners in connection with medical treatment and attendance.

The Medical Benefit Council shall perform such other duties in connection with medical treatment and attendance as may be specified in regulations.

Section 23. Duties of Director General and the Financial Commissioner.—The Director General and the Financial Commissioner shall exercise such power and discharge such duties as may be prescribed. They shall also perform such other functions as may be specified in the regulations.

Section 24. Validity of the act of the Corporation etc.—No Act done by the Corporation, the Standing Committee, or the Medical Benefit Council shall be invalid only because of the following defects, namely :—

(1) any irregularity in the appointment or election of any member ; or
(2) any member was not entitled to hold office or continue in office due to any disqualification ; or
(3) the act was done during the period when there was any vacancy in the office of a member ; or
(4) any defect in the constitution of the Corporation, the Standing Committee or the Medical Benefit Council.

Section 25. Regional Boards, Local Committees, Regional and Local Medical Benefit Councils.—Section 25 of the Act authorises the Corporation to appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such area and in such manner and delegate to them such powers and functions, as may be provided by the Regulations.

The appointment of Regional Board, its constitution, powers and duties are provided by Regulation 10 of the General Regulations. The powers and functions of the Local Committees are laid down in Regulation 10-A of the General Regulations.

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1. *B.C. Gandhi v. Amar Ahmad*, AIR 1962 SC 1704.
2. *State of Bombay v. Amar Singh*, AIR 1963 Guj 144.

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CHAPTER III
FINANCE AND AUDIT

Section 26. Employees' State Insurance Fund.—All contributions paid under the Employees' State Insurance Act and all other moneys received on behalf of the Corporation shall be paid into the Employees' State Insurance Fund. The Employees' State Insurance Fund shall be held and administered by the Corporation for the purposes of this Act.

According to sub-section (2) the Corporation may accept grants, donations, and gifts from the Central or any State Government, local authority, or any individual or body whether incorporated or not, for all or any of the purposes of this Act.

All moneys accruing or payable to the Employees' State Insurance Fund shall be paid into the Reserve Bank of India or such other bank as may be approved by the Central Government, credited to the Employees' State Insurance Fund. This rule is subject to the provisions of this Act and to any rules or regulations made under the Act.

Account of Employees' State Insurance Fund shall be operated on by such officers as may be authorised by the Standing Committee with the approval of the Corporation.

Section 28. Expenses from the fund.—Section 28 of the Act deals with various purposes on which the fund may be spent. The expenses detailed in this section are subject to the provisions of this Act and rules made by the Central Government. The Employees' State Insurance Fund shall be spent for the following purposes :

(i)(a) Payment of benefits and provision of medical treatment and attendance to insured persons in accordance with the provisions of this Act ;

(b) Provisions of medical benefit to the families of the insured persons where such benefit is extended to their families ;

(c) Defraying the charges and costs in connection with the medical treatment and attendance to insured persons and their families where the benefit extends to them ;

(ii) Payment of fees and allowances to the members of the Corporation, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Council ;

(iii)(a) Payment of salaries, leave and joining time allowance, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation ;

(b) Meeting the expenditure in respect of officers and other service set up for purposes of giving effect to the provisions of this Act ;

(iv) Establishment and maintenance of hospitals, dispensaries and other institutions and the provisions of medical and other ancillary services for the benefit of insured person. These expenses can be incurred for the benefit of the families of the insured persons, where such benefit extends to them ;

(v) Payment of contributions to any State Government, local authority or any private body or individual towards (i) the cost of medical treatment and attendance provided to insured persons and to their families (where the benefit extends to them) and (ii) cost of any building and equipment in accordance with any agreement entered into by the Corporation ;

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(vi)(a) Defraying the cost (including all expenses) of auditing the account of the Corporation ;

(b) Defraying cost of the valuation of its assets and liabilities ;

(vii) Defray the cost (including all expenses) of the Employees' State Insurance Courts set up under this Act ;

(viii) Payment of any sums under any contract entered into for the purposes of this Act by the Corporation or the Standing Committee or by any officer duly authorised by the Corporation or the Standing Committee in that behalf ;

(ix) Payment of sums under any decree, or award of any Court or Tribunal against the Corporation or any of its officers or servants for any act done in the execution of his duty or under a compromise or settlement of any suit or other legal proceeding or claim instituted or made against the Corporation ;

(x) Defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act ;

(xi)(a) Defraying expenditure on measures for improvement of health and welfare of insured persons. Expenditure on this head shall be permitted within the prescribed limits only ;

(b) Defraying expenditure for the rehabilitation and re-employment of insured persons who have been disabled or injured. The expenditure under this head is also permitted only with the prescribed limits ;

(xii) Such other expenses as may be authorised by the Corporation with the previous approval of the Central Government.

In *Bai Malimabu* v. *State of Gujarat*[1] it was held by the Supreme Court that construction of staff quarter for the employees of the dispensary and other employees working under the State Insurance Scheme does not violate Section 28 of the Act. The Employees' State Insurance Fund can be spent for such purposes under Clauses (i) and (iv) of Section 28 and if necessary by a special authorisation by the Corporation in accordance with clause (xii) of Section 28 because construction of quarters for employees is closely connected with the working and implementation of this scheme.

Section 28-A. Administrative expenses.—The types of expenses which may be termed as administrative expenses and the percentage of the income of the Corporation which may be spent for such expenses shall be as may be prescribed by the Central Government and the Corporation shall keep its administrative expenses within the limit so prescribed by the Central Government.

Section 29. Holding of Property etc.—The Corporation being a corporate body can under the law hold and acquire property. Section 29 of the Act provides that the Corporation can acquire and hold any movable or immovable property. It can also sell or transfer any property vested in or acquired by it. But the right of the Corporation to acquire, hold and dispose of property is subject to such conditions as may be prescribed by the Central Government. The Corporation can do all things necessary to advance the purposes for which the Corporation has been established.

The Corporation may, subject to the conditions prescribed by the Central Government, invest money or realise such investments. The Corporation is also authorised, with the previous sanction of the Central Government, to raise loans on such terms as may be prescribed by it. It shall also be responsible for discharging loans taken by it. The Corporation may also constitute for the benefits of its staff or any class of them, such provident or other benefit fund as it may think fit.

1. AIR 1978 SC 315.

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Section 30. Vesting of the property in the Corporation.—All property acquired before the establishment of the Corporation shall vest in the Corporation. All income derived and expenditure incurred in the acquisition of property shall be brought into the books of Corporation.

Section 32. Budget Estimates.—Every year the Corporation shall prepare its budget. The budget shall mention the probable receipts and estimate of expenditure proposed to be incurred by the Corporation during the following year. A copy of the Budget shall be submitted to the Central Government, before the date fixed by it. The budget must contain adequate provision for discharge of the liabilities incurred by the Corporation and for the maintenance of a working balance.

Section 33. Accounts.—The Corporation shall maintain, correct accounts of its income and expenditure in such form and in such manner as may be prescribed by the Central Government.

Section 34. Audit.—(1) The accounts of the Corporation shall be audited annually by the Comptroller and Auditor-General of India and any expenditure incurred by him in connection with such audit shall be payable by the Corporation to the Comptroller and Auditor-General of India.

(2) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the Corporation shall have the same rights and privileges and authority in connection with the audit as the Comptroller and Auditor-General has, in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Corporation.

(3) The accounts of the Corporation as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded to the Corporation which shall forward the same to the Central Government along with its comments on the report of the Comptroller and Auditor-General.

Section 35. Annual report.—The Corporation shall submit to the Central Government an annual report of its work and activities.

Section 36. Budget etc. to be placed before Parliament.—The annual report, the audited accounts of the Corporation, together with the report of the Comptroller and Auditor-General of India thereon and the comments of the Corporation on such report under Section 34 and the budget as finally adopted by the Corporation shall be placed before Parliament.

Section 37. Valuation of assets and liabilities.—The valuation of the assets and liabilities of the Corporation shall be made by a valuer appointed with the approval of the Central Government. Normally the valuation shall be made at intervals of five years, but the Central Government may direct a valuation to take place at any other suitable time.

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CHAPTER IV
CONTRIBUTIONS

Section 38. All Employees to be insured.—All employees in factories or establishments shall be insured in the manner provided by this Act. For an employee to be insured two conditions are provided : namely (i) he must be employed in a factory or an establishment and (ii) contributions must be either paid or payable to him under the Act.

In *Hyderabad Asbestos* v. *Employees' Insurance Court*,[1] the Supreme Court held that the words "all employees in factories" do not mean the persons employed in factories only but also include persons employed in connection with the work of the factory. The employees that are required to be insured are not restricted only to those employed in factories defined under Section 2(19) of the Act.

Section 39. Contribution.—The contribution payable under this Act in respect of an employee shall comprise the contribution partly paid by the employer and partly by the employee. The contribution payable by the employer is known as employer's contribution and that by the employee is known as the employee's contribution. The contributions shall be paid at such rates as may be prescribed by the Central Government : Provided that the rates so prescribed shall not be more than the rates which were in force immediately before the commencement of the Employees' State Insurance (Amendment) Act, 1989.

The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act. The contribution shall ordinarily fall due on the last day of the wage period. Where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such day as may be specified in the regulations.

According to Section (5)(a) if any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment :

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

According to Section 5(b) any interest recoverable under Clause (a) may be recovered as an arrears of land revenue or under Section 45-C to Section 45-I.

Explanation.—In this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934.

It was pointed out by the Supreme Court in *Hyderabad Asbestos* v. *Employees' Insurance Court*,[2] that the contribution under Section 39 is not confined only to employees actually working in factories but it extends to all who are employees within the meaning of Section 2(9) of the Act.

In *E.S.I.C.* v. *Amalgamations Repco Ltd., Madras*[3] it was held that contribution is leviable under Section 39 by which the management is liable to contribute on its own accord and such payment is not made conditional on any demand by the E.S.I.

1. AIR 1978 SC 356.
2. *Ibid.*
3. (1983) 2 LLJ 193 (Madras)

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Corporation. Where incentive bonus and night shift allowance is payable in pursuance to an agreed scheme the contribution is leviable from the date of enforcement of the production incentive bonus scheme and the night shift allowance.

It was held in the *Reid-Co-operative Timber Works Ltd.* v. *E.S.I. Corporation*,[1] that although there is no express provision in the Act under which interest can be claimed on the arrears of employees' contribution under the Act, but the Employees' State Insurance Court being a Civil Court can award interest on such contribution.

Section 40. Principal employer to pay contribution in the first instance.—Section 40 of the Act makes the employers responsible to pay the contribution in respect of all employees, whether employed by him directly or by or through an immediate employer. The contribution to be paid by the employer includes both the employer's as well as employee's contribution from the wages payable to the employee if—

(i) the employee is not an exempted employee ; and

(ii) the employee is directly employed by him.

The employer's right to deduct the employee's contribution from his wages is subject to the provisions of the Act and regulations and also subject to the following conditions :

(i) the deduction shall be made from wages for that period or part of the period in respect of which the contribution is payable ; and

(ii) no deduction, in excess of the sum representing the employee's contribution for the period shall be made.

The employer or the immediate employer shall neither be entitled to deduct the employer's contribution from the wages of employee, nor recover it from him in some other way, unless there is a contract to the contrary.

Any deduction made by the employer from the wages of an employee shall be deemed to be entrusted to him by the employee in relation to his contribution but the concept of such entrustment cannot transgress the bounds of the Employees' State Insurance Act to form a necessary ingredient of entrustment within Section 405 of the Indian Penal Code.[2] The principal employer shall bear the expenses of remitting the contributions to the Corporation.

An order directing the employer to contribute towards insurance benefits on the basis of the wages paid does not amount to deprivation of property as contemplated under Article 31 of the Constitution.[3] In *Birla Cotton Spinning and Weaving Mills* v. *Sumerchand*,[4] the legality of the deduction from the wages of the authorised leave without pay was challenged and was held to be illegal. The determination of the above question was dependent on the interepretation of the word 'period' in the proviso to Section 40(2) of the Act. In the above case it was said that the 'period' must be taken to be a week.[5] Therefore, in view of Section 42(4) no contribuiton is payable in respect of any week in which no services are rendered by an employee and no wages are paid to him.

In *Royal Talkies* v. *E.S.I. Corporation*,[6] the cinema manager had entered into an arrangement with a contract to maintain a canteen and a cycle stand. The contractor employed, on his own, workers in connection with the canteen and the cycle stand. It was held that the cinema manager was liable for the contribution as the principal

1. AIR 1970 Mad 439.
2. *Mathmull* v. *Salil Kumar*, AIR 1971 Cal 93.
3. *Nadir Ali Khan* v. *Union of India*, AIR 1954 Punj 177.
4. AIR 1963 Punj 360.
5. *Birla Cotton Spinning and Weaving Mills* v. *Sumerchand*, AIR 1963 Punj 360.
6. AIR 1978 SC 1478.

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employer of the workmen although they were engaged independently by the owner of the canteen or the cycle stand.

It was held in *E.S.I. Corpn., Indore* v. *Kailash Chandra and others*,[1] that where the owner or occupier of a factory is company, the Directors of a company cannot automatically be called as occupiers unless any one of them is so notified. Principal employer under Section 40(1) of the Act refers to owner or occupier of the factory depending on the facts of each case. But the words owner or occupier cannot be read as 'owner and occupier' and are to be read disjunctively otherwise it will create uncertainty in attaching obligations to deduct and pay the contributions. When company is owner of an establishment, company alone is liable to pay the contributions. The occupier, Managing Director or Director of a company is not personally liable.

It was held in *Employees' State Insurance Corporation & another* v. *C.N. Mathur & others*,[2] that the inclusion of 'occupier' in the defintion of "principal employer" does not render the occupier personally liable for the employer's share of the contribution.

In *E.S.I.C.* v. *Hotel Kalpaka International*,[3] the Hotel was closed with effect from 31 March 1988. But inspite of a notice from the Corporation, the respondent did not pay the contribution with effect from July 11, 1985 on plea of closure of business. The High Court held that the E.S.I.C. was not justified in proceedings against the etablishment after it was closed. But the Supreme Court rejecting the High Courts' view held that the finding of the High Court if accepted would not promote the scheme, on the contrary it would perpetuate the mischief. Any employer can easily avoid his liability and deny the beneficial piece of social security legislation to the employees by closing the business before recovery. It was further held that he cannot be allowed to contend that since he has not deducted the employees' contribution from thier wages, therefore, he cannot be compelled to pay.

Section 41. Recovery of contribution from immediate employer.—Section 41 deals with two sets of powers. Sub-section (1) deals with the powers of the principal employer to recover the employee's contribution as well as the employer's contribution from the immediate employer, in respect of employees employed by or through an immediate employer. This provision was examined by the Kerala High Court in *Hindustan Insecticides Ltd.* v. *T.M. Jaleel and others*.[4] The Court held that under this provision the principal employer is entitled to recover the amount of contribution paid by him from the immediate employer.

According to sub-section (1-A) the immediate employer shall maintain a register of employees employed by or through him as provided in the regulations and submit the same to the principal employer before the settlement of any amount payable under sub-section (1).

Sub-section (2) deals with the power of the immediate employer to deduct the employee's contribution from the wages of the employees. But his right to recover the employee's contribution is, subject to Section 40(2), limited to a deduction from the wages only to the period or part of a period for which wages are paid.

The principal employeer's power to recover the contribution paid by him from the immediate employer is twofold, namely :

(i) by way of deduction from any amount payable to the immediate employer by the principal employer under any contract, or

(ii) to treat the sum paid as a debt and recover it through a court of law.

1. (1990) 1 Lab LJ 486 (MP).
2. (1992) 2 Lab LJ 689 (Bom).
3. (1993) 1 LLJ 939 (SC).
4. (1985) 1 LLJ 176 (Ker).

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Section 42. General provisions as to payment of contribution.—The general provisions relating to the payment of contribution are as follows :

(1) No employee's contribution shall be payable by or on behalf of an employee whose average daily wages are below such wages as may be prescribed by the Central Government. The average daily wages of an employee shall be calculated in such manner as may be prescribed by the Central Government.

(2) The principal employer shall pay the employer's contribution and employee's contribution of each wage period in respect of the whole or part of which wages are payable to the employee and not otherwise.

Section 43. Method of payment of contributions.—Subject to the provisions of this Act, the Corporation may make regulations :

(1) for any matter relating or incidental to payment and collection of contribution payable under the Act ;

(2) for manner and times of payment of contribution ;

(3) for payment of contribution by means of stamps ;

(4) for the date by which Corporation is to be furnished with the evidence regarding the payment of contribution ;

(5) for entries in books or cards of contribution paid and benefit distributed ; and

(6) for issue, sale, custody, production, inspection and delivery of books or cards which have been lost, destroyed or defaced.

Section 43 does not save the Corporation's right to claim from the employer actuarial present value of periodical payments to be made by it to the dependants of the deceased employee because this right under the repealed Section 66 was a right to recover damages and not an obligation to pay benefits as contemplated by Chapter V of the principal Act to the dependants of the deceased employee.[1]

Section 44. Employers to furnish returns and maintain registers in certain cases.—Section 44 of the Act lays down the responsibility upon the principal employer and the immediate employer :

(i) to submit returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment controlld by him as may be specified in the regulations. These returns shall be submitted to the Corporation or to such officers of the Corporation as it may direct ;

(ii) submit returns containing such particulars as the Corporation may consider necessary to enable it to decide whether the provisions of this Act apply to such factory or establishment or not. It may be noted that the Corporation may ask any factory or establishment to furnish particulars only when such factory or establishment should, in its opinion, have submitted such returns, which it did not ;

(iii) to maintain such registers or records in respect of his factory or establishment as may be required by the regulations.

Section 45—Functions and duties of Inspectors.—Section 45 of the Act empowers the Corporation to appoint Inspectors for the purposes of this Act. The jurisdictional limits of the Inspector shall be assigned by the Corporation. The powers are vested in the Inspector for the purpose of :

(i) enquiring into the correctness of any of the particulars stated in any returns under Section 44 of the Act ; and

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(ii) ascertaining whether any of the provisions of the Act have been complied with.

The Inspector shall have the power to :

(a) call for any information from the employers as deemed necessary for the purposes of this Act ;

(b) enter any office, establishment, factory or other premises occupied by an employer ;

(c) require an employer or any person in charge to produce for examination the accounts, books or other documents, relating to the employment of persons and payment of wages, or furnish any other necessary information ;

(d) examine such documents as stated above and call for any other information from :

(i) principal employer or immediate employer ; or

(ii) agent or servant of the principal employer or immediate employer ; or

(iii) any person found in the factory or establishment ; or

(iv) any person believed to be an employee ;

(e) make copies of, or take extracts from registers, accounts or other documents maintained in such factory, establishment, office or other premises ;

(f) exercise such other powers as may be prescribed.

An Inspector shall exercise such functions and perform such duties as may be authorised by the Corporation or as may be specified in the regulations.

The employer is required under the Act to produce any documents when so called upon by any inspecting authority of the Corporation. Failure to produce a register by employer on demand is breach and is punishable.[1] The production of evidentiary documents under a compulsory process offends Article 20(3) of the Constitution if the documents are reasonably likely to support the case of the prosecution against such person.[2] But right of a person to refuse the production of document which he is bound to maintain and produce under some statutory provisions was not discussed in *Sharma's* case.[3] The Courts in India are inclined to take the view that whenever a person is required to maintain some registers and document and to produce them for inspection by the public officials, he must comply with the order on pain of incurring the penalty prescribed by law for non-compliance with the orders.[4]

The powers of the Inspector to call for and examine any register can be exercised when he visits any factory. He has no power to call for production of registers and documents at his office and the failure of the proprietor or manager of the factory to comply with such order of the Inspector does not expose the proprietor to any penalty.[5]

Section 45-A. Determination of Contribution in certain cases.—Section 45-A of the Act lays down the power of the Corporation to determine the amount of contribution payable in respect of the employees of a factory or establishment on the basis of information available to it where :

(1) no returns, particulars, register or records are submitted, furnished or maintained in accordance with the provisions of Section 44 of the Act ; or

1. *Employer* v. *Alibhai*, AIR 1963, Nag 79.
2. *Sharma* v. *Satishchandra*, AIR 1954 SC 300.
3. *Ibid.*
4. *Mohammad* v. *State of Orissa* ;
5. *State of Saurashtra* v. *Pitambar Sarjibhai*, (1954) 1 LLJ 138.

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(2) any Inspector or other official of the Corporation referred to in sub-section (3) of Section 45 is prevented in any manner by the principal or immediate employer, or any other person in exercise of his functions or discharging his duties under Section 45 of the Act.

But no order under sub-section (1) as above shall be passed by the Corporation unless the principal or immediate employer or the person incharge of the factory or establishment has been given a reasonable opportunity of being heard.

An order made by the Corporation under sub-section (1) shall be sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as an arrear of land revenue under Section 45-B or the recovery under Sections 45-C to Section 45-I.

The Corporation should, in a case where there is omission on the part of the employer to maintain records in accordance with the Section 44 of the Act determine the amount of contribution on the strength of such information as it may collect and can then make a demand under this section.[1]

Where the employer disputes his liability to pay contribution, he must be given by the Corporation an opportunity of hearing before finally fixing his liability under this section.[2]

In cases where the Corporation by an order made in accordance with Section 45-A determines the amount of contribution payable and the employer disputes the claim, it would not be necessary for the Corporation to seek resolution of that dispute before the Insurance Court. Such a claim is recoverable as arrears of land revenue. If the employer disputes the claim, it is for him to move the Insurance Court for relief.[3]

In cases, other than where determination of the amount of contributions under Section 45-A is made ; the corporation if its claim is disputed by the employer, should seek an adjudication of the dispute before the Insurance Court before enforcing the recovery.[4]

In *A.P. Handloom Weavers Co-operative Society, Hyderabad* v. *E.S.I. Corpn., Hyderabad*,[5] it was held that if an employer has not complied with the provisions of the Act for filing necessary returns and produce the relevant registers, it would be competent for the Corporation to initiate proceedings under Section 45-A of the Act by way of best judgment assessment. Before initiating best judgment assessment it is not necessary for the Corporation to issue prior show cause notice. Absence of such notice does not vitiate the proceedings.

The E.S.I. Corporation is under an obligation to hear the employer before determining the contribution payable by him if the employer disputes his liability because the determination of liability must be in conformity with the principles of natural justice.[6] What should be nature of this opportunity of hearing must depend on the facts and circumstances of each case.[7]

In *E.S.I.C.* v. *Ramdas Reddiar*,[8] it was held that the law of limitation will have no application in respect of any claim arising under Section 45-A. The obligation to pay contribution imposed on the principal employer and the right of the corporation to recover such contribution are creations of statute and do not exist independent of the

1. *E.S.I. Corporation, Bhopal* v. *Central Press*, AIR 1977 SC 1351.
2. *Royal Talkies, Hyderabad* v. *E.S.I. Corporation*, AIR 1978 SC 1478.
3. *Regional Director E.S.I.* v. *M/s. Fibre Bangalore (P) Ltd.*, (1980) 2 LLJ 301 (Karnataka).
4. *Ibid.*
5. (1988) 2 Lab LJ 515 (AP).
6. *Hegde and Golay Limited* v. *E.S.I. Corporation*, (1982) 1 LLJ 48 (Karn).
7. *Employees' State Insurance Corporation* v. *Asian Paint India Ltd.*, (1982) 2 LLJ 416 (Bom).
8. (1981) 1 LLJ 166 (Kerala).

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statute. The mode of recovery is prescribed in the statute itself. It is either by resort to Section 45-B or by resort to Section 75 read with Section 78(4). Therefore the right to recover contribution would not be affected by any law of limitation otherwise than what is provided in the statute itself, if there be any.

In *South India Viscose Co-operative Stores Ltd.* v. *Regional Director, E.S.I. Corporation*,[1] it was held that ability to pay contribution is not relevant and it cannot be pleaded as a ground against liability imposed by the Act. If that were so every body will escape liability by pleading financial inability to pay contribution. Similarly the plea that the employees of the establishment are not getting benefits available under the Act cannot be accepted to avoid payment of contribution. Liability to pay contribution is not made to depend on the benefits to be received by the members in respect of whom the contribution is sought for.

It was held in the *Employees State Insurance Corporation, Madras* v. *The Trichy District Co-operative Milk Producers' Union Ltd.*,[2] that before qurantifying a contribution by the Authority, natural justice requires that an opportunity of being heard must be given to the contributor. Such an opportunity is *sine qua non* without the compliance of which, the authority constituted under the Act cannot proceed with the quantification of the contribution or the recovery thereof.

Section 45-B. Recovery of contributions.—Section 45-B of the Act provides that any contribution payable under the Act may be recovered as an arrear of land revenue. The following are the modes of recovery of land revenue, namely :—

(1) by serving a writ of demand or a citation to appear on any defaulter ;

(2) by arrest and detention of his person ;

(3) by attachment and sale of his movable property ;

(4) by attachment and sale of other immovable property of the defaulter.

How long a factory or an establishment is bound to preserve its registers, records and books of accounts, is not clearly provided in the Act. An employer got the licence of his factory in 1952, but could not produce the registers and records prior to 1957 on demand by the Inspector. The employer stated that he has not maintained all the papers and documents prior to the year 1957. The Court said that there was no ground to hold that the employer failed to produce or show the books of accounts and registers as required by the Inspector under Section 55 of the Act.[3]

Section 45-C. Issue of certificate to the Recovery Officer.—(1) Where any amount is in arrear under this Act, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the factory or establishment or, as the case may be, the principal or immediate employer by one or more of the modes mentioned below :—

(a) attachment and sale of the movable or immovable property of the factory or establishment or, as the case may be, the principal or immediate employer ;

(b) arrest of the employer and his detention in prison ;

(c) appointing a receiver for the management of the movable or immovable properties of the factory or establishment or, as the case may be, the employer :

Provided that the attachment and sale of any property under this section shall first be affected against the properties of the factory or establishment and where such attachment and sale is insufficient for recovering the whole

1. (1986) 2 Lab LJ 149 (Mad).
2. (1995) 2 LLJ 581 (Madras).
3. Agarchand Mathur (1982) 1 LLJ 535.

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of the amount of arrears specified in the certificate, the Recovery Officer may take such proceedings against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under sub-section (1) notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

Section 45-D. Recovery Officer to whom certificate is to be forwarded.—(1) The authorised officer may forward the certificate referred to in Section 45-C to the Recovery Officer within whose jurisdiction the employer—

(a) carries on his business or profession or within whose jurisdiction the principal place of his factory or establishment is situate ; or

(b) resides or any movable or immovable property of the factory or establishment or the principal or immediate employer is situate.

(2) Where a factory or an establishment or the principal or immediate employer has property within the jurisdiction of more than one Recovery Officer and the Recovery Officer to whom a certificate is sent by the authorised officer—

(a) is not able to recover the entire amount by the sale of the property, movable or immovable, within his jurisdiction ; or

(b) is of the opinion that, for the purpose of expediting or securing the recovery of the whole or any part of the amount, it is necessary so to do,

he may send the certificate or, where only a part of the amount is to be recovered, a copy of the certificate in the manner prescribed by the Central Government and specifying the amount to be recovered to the Recovery Officer within whose jurisdiction the factory or establishment or the principal or immediate employer has property or the employer resides, and thereupon that Recovery Officer shall also proceed to recover the amount due under this section as if the certificate or the copy thereof had been sent to him by the authorised officer.

Section 45-E. Validity of certificate and amendment thereof.—(1) When the authorised officer issues a certificate to a Recovery Officer under Section 45-C, it shall not be open to the factory or establishment or the principal or immediate employer to dispute before the Recovery Officer the correctness of the amount, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer.

(2) Notwithstanding the issue of a certificate to a Recovery Officer, the authorised officer shall have power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate by sending an intimation to the Recovery Officer.

(3) The authorised officer shall intimate to the Recovery Officer any orders withdrawing or cancelling a certificate or any correction made by him under sub-section (2) or any amendment made under sub-section (4) of Section 45-F.

Section 45-F. Stay of proceedings under certificate and amendment or withdrawal thereof.—(1) Notwithstanding that a certificate has been issued to the Recovery Officer for the recovery of any amount, the authorised officer may grant time for the payment of the amount, and thereupon the Recovery Officer shall stay the proceedings until the expiry of the time so granted.

(2) Where a certificate for the recovery of amount has been issued, the authorised officer shall keep the Recovery Officer informed of any amount paid or time granted for payment, subsequent to the issue of such certificate.

(3) Where the order giving rise to a demand of amount for which a certificate for recovery has been issued has been modified in appeal or other proceedings under this Act, and, as a consequence thereof, the demand is reduced but the order is the subject-matter of a further proceeding under this Act, the authorised officer shall stay

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the recovery of such part of the amount of the certificate as pertains to the said reduction for the period for which the appeal or other proceeding remains pending.

(4) Where a certificate for the recovery of amount has been issued and subsequently the amount of the outstanding demand is reduced as a result of an appeal or other proceeding under this Act, the authorised officer shall, when the order which was the subject-matter of such appeal or other proceeding has become final and conclusive, amend the certificate or withdraw it, as the case may be.

Section 45-G. Other modes of recovery.—(1) Notwithstanding the issue of a certificate to the Recovery Officer under Section 45-C, the Director General or any other officer authorised by the Corporation may recover the amount by any one or more of the modes provided in this section.

(2) If any amount is due from any person to any factory or establishment, or, as the case may be, the principal or immediate employer, who is in arrears, the Director General or any other officer authorised by the Corporation in his behalf may require such person to deduct from the said amount the arrears due from such factory or establishment or, as the case may be, the principal or immediate employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Corporation :

Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a Civil Court under Section 60 of the Code of Civil Procedure, 1908 (5 of 1908).

(3)(i) The Director General or any other officer authorised by the Corporation in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the factory or establishment or, as the case may be, the principal or immediate employer or any person who holds or may subsequently hold money for or on account of the factory or establishment or, as the case may be, the principal or immediate employer to pay to the Director General either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money become due or is held) so much of the money as is sufficient to pay the amount due from the factory or establishment or, as the case may be, the principal or immediate employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the principal or immediate employer jointly with any other person and for the purposes of this sub-section, the shares of the joint-holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the principal or immediate employer at his last address known to the Director General or, as the case may be, the officer so authorised and the case of a joint account to all the joint-holders at their last addresses known to the Director General or the officer so authorised.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post-office, bank or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made

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notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the principal or immediate employer or that he does not hold any money for or on account of the principal or immediate employer, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Director General or the officer so authorised to the extent of his own liability to the principal or immediate employer on the date of the notice, or to the extent of the principal or immediate employer's liability for any sum due under this Act, whichever is less.

(vii) The Director General or the officer so authorised may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in persuance of such notice.

(viii) The Director General or the officer so authorised shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section and the person so paying shall be fully discharged from his liability to the principal or immediate employer to the extent of the amount so paid.

(ix) Any person discharging any liability to the principal or immediate employer after the receipt of a notice under this sub-section shall be personally liable to the Director General or the officer so authorised to the extent of his own liability to the principal or immediate employer so discharged or to the extent of the principal or immediate employer's liability for any sum due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in persuance thereof to the Director General or the officer so authorised, he shall be deemed to be a principal or immediate employer in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear due from him, in the manner provided in Section 45-C to 45-F and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under Section 45-C.

(4) The Director General or the officer authorised by the Corporation in this behalf may apply to the court in whose custody there is money belonging to the principal or immediate employer for payment to him of the entire amount of such money, or if it is more than the amount due, an amount sufficient to discharge the amount due.

(5) The Director General or any officer of the Corporation may, if so authorised by the Central Government by general or special order, recover any arrears of amount due from a factory or an establsihment or, as the case may be, from the principal or immediate employer by distraint and sale of its or his movable property in the manner laid down in the Third Schedule to the Income Tax Act, 1961 (43 of 1961).

Section 45-H. Application of certain provisions of the Income-tax Act.—The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, shall

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apply with necessary modifications as if the said provisions and the rules referred to the arrears of the amount of contributions, interests or damages under this Act instead of to the income-tax :

Provided that any reference in the said provisions and the rules to the "assessee" shall be construed as a reference to a factory or an establishment or the principal or immediate employer under this Act.

Section 45-I. Definitions.—For the purposes of Section 45-C to 45-H,—

(a) "authorised officer" means the Director General Insurance Commissioner, Joint Insurance Commissioner, Regional Director or such other officer as may be authorised by the Central Government, by notification in the Official Gazette.

(b) "Recovery Officer" means any officer of the Central Government, State Government or the Corporation, who may be authorised by the Central Government, by notification in the Official Gazette, to exercise the powers of a Recovery Officer under this Act.

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CHAPTER V
BENEFITS

Section 46. Benefits.—The purpose of the Employees' State Insurance Act is to provide benefits as detailed in the Act particularly in Section 46, to the insured persons or their dependants. The following benefits are provided under Section 46.

1. Sickness benefit.—It is in the form of periodical payment to any insured person, provided his sickness is certified by a duly appointed medical practitioner, or any person having such qualifications and experience as may be specified by regulations of the Corporation. Where provision is made for sick leave by standing order, the employer cannot require the employee to seek sickness benefit provided under this sub-section.[1]

In *Management of Dioccsan Press* v. *Labour Court Madras*,[2] it was held that it was not possible to accept the contention that since the employee has received sickness benefit under the Act, he is not entitled to receive the wages for the period during which he was on sick leave. But the employer is entitled to deduct the benefit received by the employee from the leave salary payable to him.

2. Maternity Benefit.—This benefit in the form of periodical payment available to an insured woman. It is payable in case of—

(i) confinement ; or
(ii) miscarriage ; or
(iii) sickness arising out of pregnancy ; or
(iv) premature birth of a child.

The grounds of eligibility of an insured woman to such payments must be certified by an Insurance Medical Officer as provided by the regulations.

3. Disablement benefit.—Any insured person shall be entitled to periodical payments if :

(i) he suffers from disablement ;
(ii) the disablement results from an employment injury ; and
(iii) he sustained the employment injury as an employee under condition mentioned in the Act.

The disablement benefit is payable only when the injury is duly certified by an Insurance Medical Officer.

4. Dependents benefit.—This benefit is available to such dependents, of an insured person who dies as a rsult of an employment injury sustained as an employee, as are entitled to compensation under this Act.

5. Medical benefit.—Medical benefit is available to an injured person or to a member of his family, were such benefit is extended to the members of his family. This benefit is in the following forms :

(i) out-patient treatment and attachment in the hospital or dispensary ; or
(ii) by visits of the home of the insured ; or
(iii) as an in-patient in a hospital or other institution.

6. Funeral expenses.—Funeral expenses are payable to the eldest surviving

1. *M.L. Kuntarao* v. *Azam Johi Mills Ltd. Warangal*, (1970) Lab IC 585 (AP).
2. (1982) 1 LLJ 451 (Mad).

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member of the family or to such person who actually incurs funeral expenses. The amount of such payment shall not exceed such amounts as may be prescribed by the Central Government. Any claim for the funeral expenses must be made within three months of the death of the insured person or within such extended period as the Corporation or any other competent official may allow.

Section 49. Sickness benefit.—The qualification of a person to claim sickness benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government.

An award of seven days' sick leave on production of a medical certificate in addition to the benefits under the Employees' State Insurance Act was held justified by the Supreme Court.[1] The sickness benefit shall be paid at the rates specified in the First Schedule.

Section 50. Maternity benefit.—The qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government.

Section 51. Disablement benefit.—Subject to the provisions of this Act :

(a) a person who sustains temporary disablement for not less than three days (excluding the day of accident) shall be entitled to periodical payment at such rates and for such period and subject to such conditions as may be prescribed by the Central Government.

(b) a person who sustains permanent disablement whether total or partial, shall be entitled to periodical payment at such rates and for such period and subject to such conditions as may be prescribed by Central Government.

Section 51-A. Presumption as to accident arising in course of employment.—Section 51-A provides that if it is shown that the accident arose in the course of employment of an insured person, it would be presumed also to have arisen out of employment. But the presumption is a rebuttable one and applied to this Act only.

Section 51-B. Accidents happening while acting in breach of regulation.—Section 51-B of the Act provides an explanation to the expression "out of and in the course of employment". An accident shall be deemed to arise out of and in the course of employment if the act is done for the purpose of and in connection with employer's trade or business unless :

(i) the insured person is at the time of accident acting in contravention of the provisions of any law applicable to him ; or

(ii) the insured person is acting in contravention of any orders given by or on behalf of his employer ; or

(iii) he is acting with instructions from his employer :

Provided the accident would have been otherwise deemed to arise 'out of and in the course of employment' in the absence of any one of the above three contingencies.

Section 51-C. Accidents happening while travelling in employer's transport.—Section 51-C of the Act incorporates the principle of notional extension of employer's premises. This section lays down the liability of the employer for the payment of benefit for accident arising while an employee is travelling in any transport provided by the employer while going to or coming from work. The conditions for holding the employer liable are the following :—

(i) an insured person must be travelling by any vehicle with the express or implied permission of his employer ;

(ii) he must be going to or coming from his place of work ;

1. *Technological Institute of Textiles* v. *Its Workmen*, (1955) 2 L.L.J. 150 (SC).

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(iii) the vehicle must be operated by or on behalf of his employer or some other person in pursuance of an agreement made with the employer ;

(iv) the vehicle is not being operated in the ordinary course of public transport service.

Under the circumstances the accident shall be deemed to arise out of and in the course of employment even if there is no obligation on the employee to travel by that vehicle provided the accident would have been so considered had there been an obligation on the part of the insured person to travel by that vehicle.

It is evident from the provisions of this section that a case of travelling by a vehicle which is operated in the ordinary course of public transport is not covered by this section. Therefore, any accident while travelling by such vehicle would not entitle the insured person to claim compensation under the Act.

Section 51-D. Accident happening while meeting emergency.—An accident happening to an insured person on the premises of his employment shall be deemed to arise out of and in the course of his employment if :—

(i) the insured person is on such premises employed for the purpose of his employer's trade or business ;

(ii) the accident happens while he is taking steps to rescue, succour or protect person who might be injured or imperilled ;

(iii) these steps may be taken to avert an actual or supposed emergency to persons. The steps may also be taken to avert or minimise serious damage to property.

This section clearly overrides the principle of 'added peril performance of duty'. The principle of 'added peril performance of duty' means that no compensation shall be payable if a workman while doing his master's work undertakes to do something which involves extra danger to him.

Section 52. Dependant's benefit.—(1) If any insured person dies as a result of an employment injury sustained as an employee under this Act (whether or not he was in receipt of any periodical payment for temporary disablement in respect of the injury) dependant's benefit shall be payable at such rates and for such periods and subject to such conditions as may be prescribed by Central Government to his dependants specified in sub-clause (i), sub-clause (i-a) and sub-clause (ii) of clause (6-A) of Section 2.

(2) In case the insured person dies without leaving behind him the dependants as aforesaid, the dependant's benefit shall be paid to the other dependants of the deceased at such rates and for such period and subject to such conditions as may be prescribed by the Central Government.

In *E.S.I. Corporation* v. *Sayeeda Khatoon Donawala & others*,[1] a workman standing in the queue waiting for a bus provided by the employer to reach the factory was runover by the same bus. It has held that the workman sustained employment injury and the doctrine of notional extension was applicable. Recovery of compensation from the owner of the motor vehicle or from the Insurance Company under the Motor Vehicles Act will not absolve the employer from making payment under Section 52 of the Act.

Section 52-A. Occupational disease.—The expression "occupational disease" has nowhere been defined in the Act, but a list of these diseases along with the employments peculiar to them is given in the third schedule of the Act. Any employee who contracts any such occupational disease while working in any of these employments shall be deemed to have contracted an employment injury. The third

1. 1995 A.C.J. 173 (Bom).

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schedule is divided into three parts. For occupational disease mentioned in Part A no period of employment is necessary ; but in case of any disease mentioned in Part B of Schedule III, the insured person must have served in the employment peculiar to that disease for a period of not less than 6 months. In case of an occupational disease specified in Part C of that schedule the period of employment shall be such as is specified by the Corporation in respect of that employment. The contracting of an occupational disease peculiar to insured person's employment shall be deemed to be an employment injury arising out of and in the course of employment.

The Central Government, State Government and the Corporation are empowered under sub-section (2) to add to the third Schedule any occupational disease and the employment relating thereto. But the Corporation before adding any employment or an occupational disease in relation to such employment in the III Schedule, shall give notice in the Official Gazette. Any disease or employment so added shall form part of the III Schedule and the provisions of this Act shall apply to them. The exercise of power by the Central and the State Governments is expressly made subject to the provisions of Section 3 (3) of the Workmens' Compensation Act.

No disease other than the occupational diseases specified in Schedule III is recognized by the Act as an employment injury. In case of contracting of any other disease no benefit shall be payable to an employee in respect of any such disease unless the disease is proved to be directly attributable to a specific injury by accident arising out of and in the course of his employment. Evidently, it would always be a question of fact and the onus would lie upon the person claiming any such benefit to prove the causal connection between employment and disease.

The provisions of Section 51-A shall not apply to the case to which Section 52-A applies.

Section 53. Bar against receiving or recovery of compensation or damages under any other law.—This section enacts a kind of prohibition against the insured person or his dependants from receiving or recovering any compensation or damages under :

(a) the Workmen's Compensation Act, or

(b) any other law for the time being in force or otherwise from :—

(i) the employer, or

(ii) from any other person.

It may be noted that the insured person under the Act has no option to elect the kind of remedy. The bar created under this section operates irrespective of the fact that the insured person has received benefit under the Act or not.

It was held in *Bhajan Ram* v. *E.S.I. Corporation*,[1] that "the right of the dependant to claim benefit under Section 53 is independent and the mere fact that some amount of compensation has been paid to him under the Workmen's Compensation Act, 1923 would not disentitle him from realising the dependant's benefit under the Act".

In *Deputy General Manager, Karnataka State Road Transport Corporation* v. *Gopal Mudaliar*,[2] a workman while going on a bicycle met with a motor accident. This accident does not amount to an employment injury and therefore, no benefits are payable under Section 53 and as such a remedy under the Motor Vehicles Act is not barred. But if a person is entitled to the benefits under the E.S.I. Act he is debarred from claiming any compensation under the Motor Vehicles Act.[3]

1. 71 Punj LR 641.
2. (1983) 1 LLJ 340 (Karn).
3. *V. Thangappan* v. *Tamil Nadu Industrial Insurance Corpn.* (1993) 2 LLJ 483 (Mad).

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In *Ashokan* v. *Western India Plywoods Ltd.*,[1] it was held that the scheme of this Act does not purport to deal with the tortious liability of the employer. Therefore an employee covered by the E.S.I. Act can sue for damages in torts because a liability created under a statute and to be remedied under the statute does not extinguish an antecedent liability existing under common law or otherwise. The situation cannot be different even though the suit for damages has been filed by an indigent person.

Section 54. Determination of question of disablement.—The following matters shall be determined by a Medical Board constituted in accordance with the provisions of the regulations :

(i) whether the relevant accident has resulted in permanent disablement ; or

(ii) whether the extent of loss of earning capacity can be assessed provisionally or finally ; or

(iii) whether the assessment of the proportion of the loss of earning capacity is provisional or final ; and

(iv) in the case of provisional assessment the period for which such assessment shall hold good.

Any such matter as referred to above shall be known as "the disablement question".

Section 54-A. References to Medical Board etc.—All questions relating to disablement shall be referred to the Medical Board for determination. The case of any insured person for permanent disablement benefit shall be referred by the Corporation to a Medical Board for determination of the disablement question. In case of provisional assessment, it shall be referred to the Board within the period of provisional assessment.

Sub-section (2) of Section 54-A povides for appeal where the insured person or the Corporation is not satisfied with the decision of the Medical Board. The appeal may be preferred in the prescribed manner and within the time prescribed under the rules. An appeal may be made to the Medical Appeal Tribunal and then to the Employees' Insurance Court, or to the Employee's Insurance Court directly. The Medical Appeal Tribunal shall be constituted by the State Government. The State Government has also the right to frame rules for filing appeal and prescribing time within which an appeal should be made.

A reference to the Medical Board may be made by the Corporation—

(i) at the time, on the recommendation of an Insurance Medical Officer ; and

(ii) on its own initiative after the expiry of the period of twenty-eight days from the first date on which the claimant was rendered incapable of work by the relevant employment injury :

Provided that no appeal by an insured person shall lie under this sub-section if such person has applied for commutation of disablement benefit on the basis of decision of the Medical Board and received the commuted value of such benefit :

Provided further that no appeal by the Corporation shall lie under this sub-section if the Corporation paid the commuted value of the disablement benefit on the basis of decision of the Medical Board.

It was held in *Vasudevan Nair* v. *Regional Director E.S.I.C.*[2] that though the Insurance Court may not have the expertise, the statute has empowered the Insurance Court to examine the correctness of the certificate issued by the Medical Board.

Section 55. Review of decisions by Medical Board or Medical Appeal Tribunal.—Section 55 of the Act provides for review of a decision regarding any assessment of the extent of the disablement whether provisional or final by the Medical

1. (1987) 2 Lab LJ 183 (Kerala).
2. (1991) 1 Lab LJ 359 (Kerala).

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Board or Medical Appeal Tribunal. Review of the decision is permitted on the following grounds :

(i) if the decision was given in consequence of the non-disclosure by the employee or any other person of a material fact ; or

(ii) if the decision was given in consequence of the misrepresentation by the employee or any other person of a material fact ; or

(iii) if the Medical Board or Medical Appeal Tribunal, on the basis of fresh evidence is satisfied about the fact of non-disclosure or misrepresentation.

It may be noted that it is not necessary to prove that the non-disclosure or misrepresentation was fraudulent.

The following are the conditions for the review of the assessment of the extent of the disablement resulting from the relevant employment injury by the Medical Board :

(1) There should be substantial and unforeseen aggravation of the results of the relevant injury.

(2) The Board must be satisfied of the aggravation of injury.

(3) The Board must be of the opinion that substantial injustice would be done if review is not made.

(4) The application for review must be made after five years in case of final assessment and after six months in the case of provisional assessment from the date of the relevant assessment. Any review prior to the said period by the Board can only be made by the leave of a Medical Appeal Tribunal.

(5) In making revised assessment the period prior to the date of application will not be taken into account. The revised assessment will be made from the date of application.

The Medical Board in deciding an application for review—

(a) can deal with it as if it were a reference under Section 54-A of the Act ; or

(b) may make a provisional assessment.

Section 55-A. Review of dependant's benefit.—The conditions for review of dipendant's benefit as provided in Section 55-A of the Act are as follows :—

(1) There must be fresh evidence to show that the previous decision was given in consequence of—

(a) non-disclosure of materials fact ; or

(b) misrepresentation, whether fraudulent, or not.

(2) Non-disclosure of misrepresentation might have been made either by the claimant himself or any other person.

(3) If the decision is no longer in accordance with this Act due to the happening of birth, marriage, remarriage, cesser of infirmity or attainment of the age of 18 years by a claimant.

(4) Review of dependant's benefit shall be made by the Corporation.

(5) The dependants' benefit as a result of review may be continued, reduced or discontinued.

Section 56. Medical benefit.—Under Section 55 of the Act medical benefit shall be given to an insured person or to a member of his family where the benefit is extended to his family. This benefit shall be given to an insured person or a member of his family, whose condition requires medical treatment and attendance.

Medical benefit may be given in the following form :—

(i) outpatient treatment ; or

(ii) attendance in a hospital, dispensary, clinic or other institution ; or

(iii) visits to the home of the insured person ; or

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(iv) treatment as inpatient in a hospital or other institution.

A person shall be entitled to medical benefit during any period :

(i) for which contributions are payable in respect of him ; or

(ii) in which he is qualified to claim sickness benefit or maternity benefit ; or

(iii) in which he is in receipt of such disablement benefit as does not disentitle him to medical benefit under the regulations.

A person in respect of whom contribution ceases to be payable under this Act may be allowed medical benefit for such period and of such nature as may be provided under the regulations.

Provided further that an insured person who ceases to be in insurable employment on account of permanent disablement shall continue, subject to payment of contribution and such other conditions as may be prescribed by the Central Government, to receive medical benefit till the date on which he would have vacated the employment on attaining the age of superannuation had he not sustained such permanent disablement :

Provided also that an insured person, who has attained the age of superannuation, and his spouse shall be eligible to receive medical benefit subject to payment of contribution and such other conditions as may be prescribed by the Central Government.

Explanation.—In this section "superannuation", in relation to an insured person, means the attainment by that person of such age as is fixed in the contract or conditions of service as the age on the attainment of which he shall vacate the insurable employment or the age of sixty years where no such age is fixed and the person is no more in the insurable employment.

Section 57. Scale of Medical Benefit.—An insured person and his family (where such benefit is extended to his family) shall be entitled to the medical benefit as provided below :

(1) medical benefit of such kind as may be provided by the State Government or the Corporation ;

(2) medical benefit on such sale as may be provided by the State Government or the Corporation ;

(3) only such medical treatment as is provided by the dispensary, hospital, clinic or other institution to which the insured person or his family is allotted ;

(4) such benefit as may be provided by regulations ;

(5) no claim for reimbursement from the Corporation, of any expenses incurred in respect of any medical treatment is allowed except as may be provided by regulations.

Section 58. Provisions of medical treatment by State Government.—Section 58 of the Act makes the State Government responsible for providing medical treatment to the insured person and to his family where such benefit is extended to his family. Medical treatment to be provided by the State Government should be reasonable and shall consist of medical, surgical and obstetric treatment.

With the approval of Corporation, the State Government may arrange for medical treatment at clinics of medical practitioners. The scale, terms and conditions of medical treatment shall be regulated by an agreement.

Where the amount of sickness benefit to insured person incurred in State exceeds the all India average, the amount in excess of such average shall be shared between the Corporation and the State Government in such proportion as may be fixed by agreement between them. The Corporation has power to waive off the whole or any part of the share which is to be borne by the State Government.

The Corporation is further empowered to enter into an agreement with the State

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Government and decide :

(i) the nature and scale of the medical treatment to be provided to insured persons and their families ;

(ii) the provision of buildings, equipment, medicines and staff ;

(iii) the sharing of cost of the above benefits ; and

(iv) sharing of any amount spent in excess of the all India average.

The above matters, in absence of an agreement between the Corporation and the State Government, shall be determined by an arbitrator appointed by the Chief Justice of India.

A retired Judge of a High Court or any person working as a Judge of the High Court is qualified to be appointed as an arbitrator under this section. The award of the arbitrator shall be binding on the Corporation and the State Government.

Section 59. Establishment and Maintenance of hospitals etc., by Corporation.—Section 59 of the Act authoirses the Corporation to establish and maintain in a State hospital, dispensaries and other medical and surgical services for the benefit of insured person or his family. The Corporation has to obtain the approval of the State Government for this purpose.

The Corporation is further authorised to enter into agreement with any local authority, private body or individual, regarding medical treatment and attendance for the insured person and his family in any area and sharing the cost thereof.

Section 59-A. Provisions for medical benefit by the Corporation.—Section 58 of the Act make the State Government responsible for providing medical benefit. Under Section 59-A of the Act the Corporation in consultation with State Government may take the responsibility of making provision for medical benefit to the insured person and his family. Where the responsibility of providing medical benefit is undertaken by the Corporation, the cost of such medical benefit shall be shared between the Corporation and the State Government in such proportion as may be agreed upon between them. The Corporation shall also exercise power and discharge responsibilities in the same manner as the State Government exercises in any matter relating to medical benefit.

Section 60. Benefit not assignable or attachable.—Various benefits are payable in the form of periodical payments under the Act. Some of them are payable to the insured persons only, while others are payable to the insured person as well as to his family or the dependants. Section 60 of the Act provides that none of these benefits payable under the Act shall be transferable or assignable. Similarly no cash benefit payable under this Act shall be liable to attachment or sale in execution of any decree or order of any Court.

Thus the benefit is made inalienable and is exempt from attachment. Normally no execution can lie against such a sum.[1]

Section 61. Bar of benefit under other enactments.—Section 61 of the Act is couched in general terms and prohibits any person to receive any other similar benefit admissible under the provisions of any other enactment where he is entitled to receive the same under this Act. Section 61 "though prevents the dependant from receiving over and again any benefit similar to dependant's benefit which he is entitled to receive under any other enactment, it does not provide for the situation as to what would happen where a person actually receives such benefits under any other enactment before he prefers claim under the Act".[2]

In *Alembic Glass Industries* v. *Workmen*[3] the workman demanded sick leave. The

1. *Union of India* v. *Hira Devi*, AIR 1952 SC 227.
2. *Bhajan Ram* v. *E.S.I. Corporation*, 71 Punj LR 644.
3. AIR 1976 SC 2091.

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Supreme Court held that the Act does not in fact deal with the question of sickness leave. The benefits admissible under the Act do not cover sick leave.

Section 62. Persons not to commute cash benefits.—The Workmen's Compensation Act permits to commute the periodical payment of compensation into a lump sum. Section 62 of the Employees' State Insurance Act prohibits commutation for a lump sum of any disablement benefit except that which is permitted by the Regulations.

Section 63. Persons not entitled to receive benefits in certain cases.—Save as may be provided in the regulations, no person shall be entitled to sickness benefit or disablement benefit for temporary disablement on any day on which he works or remains on leave or on a holiday in respect of which he receives wages or on any day on which he remains on strike.

Section 64. Recipient of sickness or disablement benefit to observe conditions.—This section lays down the following conditions for observance by the recipients of sickness or temporary disablement benefit :

(a) such person shall remain under medical treatment at a dispensary, hospital, clinic or other institution provided under the Act. He shall also carry out the instructions given by the Medical Officer or medical attendant in-charge thereof ;

(b) he shall not, while under treatment do anything which might retard or prejudice his chances of recovery ;

(c) he shall not leave the area in which medical treatment provided by this Act is being given, without the permission of the Medical Officer, medical attendant or such other authority as may be specified in this behalf by regulations ;

(d) he shall also allow himself to be examined by any duly appointed medical officer, or other person authorised by the Corporation in this behalf.

Section 65. Benefits not to be combined.—This section lays down a prohibition against receiving two benefits at a time. An insured person shall not be entitled to receive for the same period the following combination of benefits simultaneously :

(1) sickness benefit and maternity benefit ; or

(2) sickness benefit and disablement benefit for temporary disablement ; or

(3) both maternity benefits and disablement benefit for temporary disablement.

The insured person entitled to more than one benefits shall have an option to choose one of the two benefits.

Section 68. Corporation's right where a principal employer fails or neglects to pay contribution.—An insured employee is entitled to receive full benefits under the Act. If the principal employer fails to pay the contribution either in full or in part, the right of the insured person to get full benefit is in no way affected. Therefore in any case of failure or neglect on the part of the employer to pay the contribution, if the Corporation is satisfied that the contribution should have been paid by the principal employer, the Corporation has the following powers :

(1) either the Corporation can recover twice the amount of the contribution which the principal employer failed to pay ; or

(2) the Corporation can recover the difference between the amount of benefit paid and the amount which he would have received on the basis of contribution paid, whichever is higher.

The Corporation has also the power to pay to the person full benefit to which he would have been entitled in the absence of failure or neglect on the part of the employer. Any amount so paid by the Corporation and recoverable from the employer under this section may be recovered as if it were an arrear of land revenue or under Section 45-C

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to Section 45-I.

Section 69. Liability of owner or occupier of factories etc. for excessive sickness benefit.—If the Corporation incurs excessive amount on account of sickness benefit, it may claim for the payment of expenditure from the following—

(i) the owner or occupier of factory or establishment ; or

(ii) the owner of the tenements or lodgings.

If the claim so made is not settled by agreement, the Corporation may refer the matter, with a statement in support of its claim, to the appropriate Government. This claim of the Corporation is further subject to following conditions :—

(i) Extra expenditure incurred by the Corporation as sickness benefit should be due to the excessive incidence of sickness among insured persons ;

(ii) Excessive sickness must be attributable to—

(a) insanitary working conditions in a factory or establishment ; or

(b) the neglect of the owner or occupier of the factory or establishment to observe any health regulations enjoined on him under any enactment ; or

(iii) excessive sickness because of—

(a) insanitary conditions of any tenements or lodging occupied by insured persons ; or

(b) neglect of the owner of the tenements or lodgings to observe any health regulation enjoined on him by or under any enactment.

Where a dispute relating to any claim as aforesaid is referred to the appropriate Government by the Corporation, the Government may appoint a competent person or persons to hold an enquiry into the matter, provided the Government is of the opinion that a *prima facie* case on inquiry is disclosed.

If the person holding enquiry are satisfied that the excess incidence of sickness among the insured persons is due to any reasons alleged by the Corporation, they shall determine the amount of the extra-expenditure incurred as sickness benefit. They shall also determine the extent of the liability of the defaulters and fix up the amounts to be paid by them individually to the Corporation. Any such determination shall be enforceable as a decree of a Civil Court.

For the purposes of this section "owner" of tenements or lodging shall include any agent of the owner and any person who is entitled to collect the rent of the tenements or lodgings as a leasee of the owner.

Section 70. Repayment of benefit improperly received.—If any amount, in excess of that has been due, is paid by the Corporation to any person, the Corporation has the right to be reimbursed to the extent of any excess made by it. The liability of repayment lies either on the person receiving the benefit or in case of his death, on his legal representative, who shall pay from the assets of the deceased, if any, in his hands. Any excess cash payment shall be repaid. The value of any benefits not paid in cash, shall be determined by such authority as may be specified in the regulations. The decision of such authority shall be final. The amount recoverable under this section may be recovered as if it were an arrear of land revenue or under Sections 45-C to Section 45-I.

Section 71. Benefit payable upto and including day of death.—If a person dies during any period for which he is entitled to cash benefit under this Act, he shall be paid that benefit in cash. Such benefit is payable for the period upto and including the day of death of the person. The following are authorised to receive any such payment :

(i) any person nominated by the deceased person in writing in such form as may be prescribed in the regulations ; or

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(ii) if there is no such nomination, to the heir or legal representative of the deceased person.

Section 72. Employer not to reduce wages.—Irrespective of the liability of the employer to pay contribution under this Act, he cannot :

(a) reduce the wages to his employees, whether directly or indirectly ; or

(b) discontinue or reduce benefits, payable to an employee under conditions of his employment, which are similar to the benefits conferred by this Act, except as provided in regulations.

In *Bareilly Holdings Ltd.* v. *Their Workmen*[1] it was held that the object of Section 72 is to discourage employers from using the benefits provided under the Act as excuse or justification for reducing or discontinuing the benefit available to the workman under the conditions of service on the ground of similarity between the two types of benefits.

Section 73. Employer not to dismiss or punish employee during period of sickness.—Section 73 of the Act lays down that the employer shall not dismiss, discharge or reduce or otherwise punish any employee :

(1) during the period he or she is in receipt of sickness benefits or maternity benefit ; or

(2) who is receiving disablement benefit for temporary disablement ; or

(3) who is under medical treatment for sickness ; or

(4) who is absent from work as a result of illness arising out of pregnancy or confinement.

The illness must be duly certified in accordance with the regulations.

No notice of dismissal or discharge or reduction given to an employee during the period mentioned above shall be valid or operative.

Section 73(1) of the Act prohibits the employer to take punitive action during the period an employee is in receipt of benefit mentioned therein. Any notice of punitive action given during the aforesaid period to an employee shall be invalid. Reading all the sub-sections together it becomes clear that the giving of notice during the specified period is prohibited not only when it is in regard to dismissal, discharge or reduction in respect of sickness alone but includes any notice for any misconduct. Thus the prohibition is not confined to punitive action on the basis of absence owing to sickness but includes punitive action of all kinds of misconduct which justifies the imposition of penalty. The object of such a prohibition seems to be to restrain all punitive actions during the pendency of the employee's illness. It was held in *Management of Guest Keen Williams Ltd.* v. *Presiding Officer II Addl. Labour Court, Bangalore*,[2] that any contravention of Section 73 would not only render the dismissal or discharge invalid but would also expose the management itself to the peril of prosecution. But where the termination of the employee's service follows automatically either from a contract or from a standing order by virtue of the employee's absence without leave for the specified period such termination, is not the result of any punitive act or order on the part of the employer, so to such a termination the prohibition contained in Section 73(1) would be inapplicable.[3] Discussing the meaning of the expression "discharge" occurring in Section 73(1) their Lordships of the Supreme Court held that termination of service under Standing Order 8(ii) is not covered by that expression and does not, therefore, contravene the provisions of Section 73(1).[4]

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1. AIR 1979 SC 1211 : (1979) 1 LLJ 352 (SC).
2. (1991) 1 Lab LJ 846 (Karn).
3. *Buckingham Carnatic Mill Ltd.* v. *Venkatish*, AIR 1964 SC 1270.
4. *Ibid.*

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CHAPTER VI
ADJUDICATION OF DISPUTES AND CLAIMS

Section 74. Constitution of Employees' Insurance Court.—Section 74 of the Act authorises the State Government to constitute an Employees' Insurance Court. The Insurance Court shall be constituted by issuing a notification in the Official Gazette. The local area within which the Court shall, exercise its jurisdiction will be specified in the notification. The number of Judges, as shall constitute the Court, shall be determined by the State Government. A judicial officer or a legal practitioner of five years' standing is qualified for the appointment as a Judge of the Employees' Insurance Court. The State Government may appoint the same Court for two or more local areas, or two or more Courts for the same local area. Where there are more than one Court in the same local area, the distribution of work amongst them may be regulated by general or special order of the State Government.

In *Jiyaji Rao Cotton Mills* v. *E.S.I.C.*[1] the following two questions were involved :

(1) Is it necessary to constitute an Employees' Insurance Court first and then to appoint a judge to discharge the functions of that Court ?

(2) Whether the State Government was bound to frame rules under Section 96 of the Act first before it could exercise the power conferred on it by Section 74 of the Act ?

It was held that there is nothing in the general law or in the specific provisions of Sections 75 and 96 suggesting that it was necessary for the State Government to have constituted an Employees' Insurance Court first and thereafter appoint an officer as judge to discharge the functions thereof. In Section 74 the word 'Court' is used in a compendious sense.

Further the State Government was not bound to frame rules under Section 96 before it could constitute Employees' Insurance Court in exercise of its powers under Section 74.

Section 96 is merely enabling in nature. Its provisions were never intended to place an embargo on the other provisions contained in the Act. The only condition for the exercise of its powers by the Government under Section 74 are to be found within the four-corners of that section. The exercise of the power under Section 74 was not intended to be made subject to any rules that may be framed by State Government under Section 96 thereof.

Section 75. Matters to be decided by Employees' Insurance Court.—Any question or dispute subject to the provisions of sub-section (2-A) relating to the following matters shall be decided by the Employee's Insurance Court :

(1) whether any person is an employee or is liable to pay the employee's contribution ; or

(2) the rate of wages of average daily wages for the purpose of this Act ; or

(3) the rate of contribution payable by the principal employer in respect of any employee ; or

(4) the person who is or was the principal employer in respect of any employee ; or

1. AIR 1962 Madh Pra 340.

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(5) the right of any person to any benefit and the amount and duration of that benefit ; or

(6) the direction issued by the Corporation under Section 55-A on a review of any payment of dependant's benefits ; or

(7) any other matter which is in dispute between :

(i) a principal employer and the Corporation ; or

(ii) a principal employer and an immediate employer ; or

(iii) a person and the Corporation ; or

(iv) an employee and a principal or immediate employer.

The dispute between the above parties may be in respect of :

(i) any contribution, benefit or other dues payable or recoverable under this Act ;

(ii) any other matter required to be or which may be decided by the Employees' Insurance Court under this Act.

Subject to the provisions of sub-section (2-A) the following claims shall be decided by the Employees' Insurance Court :

(a) any claim for the recovery of contributions from the principal employer ;

(b) any claim by a principal employer to recover contributions from any immediate employer ;

(c) any claim against a principal employer under Section 68 ;

(d) any claim under Section 70 for the recovery of the value or amount of the benefits received by a person when he is not lawfully entitled thereto ; and

(e) any claims for the recovery of any benefit admissible under the Act.

Sub-section (2-A) provides that if in any proceedings before the Employees' Insurance Court a disablement question arises, the decision of which is necessary for the determination of any claim or question pending before such Court, the Court shall direct the Corporation to get the disablement question first decided by the Medical Board or Medical Appeal Tribunal in accordance with the Act. Thereafter that claim shall be decided by the Employees' Insurance Court in conformity with the decision of the Medical Board or Medical Appeal Tribunal. There is one exception to this rule. Where an appeal has been filed before the Employees' Insurance Court under Section 54-A(2), the Court may itself determine all the issues arising before it.

According to sub-section (2-B) no matter which is in dispute between a principal employer and the Corporation in respect of any contribution or any other dues shall be raised by the principal employer in the Employees' Insurance Court unless he has deposited with the Court fifty per cent of the amount due from him as claimed by the Corporation :

Provided that the Court may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this sub-section.

Sub-section (3) of Section 75 bars the jurisdiction of Civil Court in respect of any matter covered by this section and to be decided by (i) Medical Board, Medical Appeal Tribunal or (ii) Employees' Insurance Court.

This sub-section is based on the principle that where the liability is created by a statute, party aggrieved must pursue the special remedy provided by it. In such cases the jurisdiction of the Civil Court is not completely ousted but is limited. A suit in a Civil Court will always lie to question the order of a Tribunal created by a statute, even if its order is expressly or by necessary implication made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.[1]

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1. *Firm Radhey Krishna v. Ludhiana Municipality*, AIR 1963 SC 1547.

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The employer can question the determination and amount of employer's special contribution. It is not correct to say that the Corporation has no jurisdiction to determine amount and recover it under Section 73-D without first having recourse to Employees' Insurance Court.[1] Further, the contention that the employer can apply only after paying amount is also not correct.[2] Where the Corporation claimed employees' contribution but failed to state the names of the employees in regard to whose wages contribution had been claimed in the application, the proceedings were not bad on this account.[3]

A petition for claim filed before the Employees' Insurance Court is not a 'suit' for the purposes of the Limitation Act and therefore the provisions of the Limitation Act do not apply to it.[4]

The Employees' Insurance Court has jurisdiction to decide the benefit to which a disabled employee is entitled.[5] It is also competent to decide the duration of such benefit. The determination of claim under Section 75(1)(g) by Insurance Court is a condition precedent for issuing certificate to Collector for recovery of arrears of employees' contribution.[6]

In *Regional Director, E.S.I. Corpn.* v. *S. Saravanam*,[7] it was held that where injury suffered by an insured person is not one specified in the Schedule to the Act, the Medical Board, Medical Appeal Tribunal or the Employees' Insurance Court has power to determine the extent of diminution or reduction in the earning capacity for the purposes of payment of disablement benefit.

In *South-India Granite Corporation* v. *Employees' S.I. Corporation, Hyderabad*,[8] the Corporation determined the liability of the employer to pay contribution on the basis of report submitted by the Inspector. It was argued that if a claim made under Section 45 of the Act is disputed it is for the Corporation to move the Employees' State Insurance Court to get the dispute adjudicated and the employer is not obliged to file an application. Rejecting this contention the High Court held that on a reading of Section 45-A and Section 75, it is clear that positive power has been conferred on the Corporation to determine the amount which the employer is liable to pay towards contribution under the Act. If the employer feels aggrieved by the determination he has to raise the dispute in the Insurance Court for due adjudication. Otherwise the recovery of contribution will be effected both under Section 45-A as well as under Section 45-B of the Act. The Employees' State Insurance Corporation is not obliged to invoke jurisdiction of the Insurance Court.

In *Anthony Kutty* v. *E.S.I. Corporation*[9] a person not entitled to benefits under the E.S.I. Act was given certain benefits. When this fact came to the knowoledge of the Corporation it initiated proceedings under Section 70 of the E.S.I. Act for recovery under the Revenue Recovery Act. The question for determination was whether the Corporation is bound to seek adjudication in E.S.I. Court or can itself initiate proceeding under the Revenue Recovery Act. It was held that Section 75(2) does not compel the Corporation to move the Court whenever there is a claim which they have to enforce. The Corporation may proceed to reocever the amount as an arrear of land revenue on the basis of its determination and leave it to the person affected to move the Court.

1. *Amirchand* v. *E.S.I. Corporation*, (1969) 1 LLJ 162.
2. *Ibid.*
3. *R.L. Sharma* v. *E.S.I. Corporation*, 1969 Lab IC 263 (Punj).
4. *Employees' State Insurance Corporation, Hyderabad* v. *Andhra Pradesh State Electricity Board, Himayatnagar*, 1970 Lab IC 921 (AP).
5. *E.S.I. Corporation Madras* v. *A. Zackaria*, (1970) 2 LLJ 62.
6. *Gemini Studios, Madras* v. *E.S.I. Corporation, Madras*, (1970) 2 LLJ 242.
7. (1991) 2 Lab LJ 494 (Karn).
8. (1986) 1 Lab LJ 441 (Andhra Pradesh).
9. (1988) 1 Lab LJ 80 (Kerala).

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It is not obligatory on the part of the Corporation to approach the E.S.I. Court under Section 75 prior to the determination of claim under Section 45-A.[1] There is a little substance in the contention of the employer that usually because an order requiring an establishment to pay contribution, as determined under Section 45-A is not acceptable to him, a further duty is cost on the Corporation to make a reference to the Insurance Court to obtain its seal of approval before steps for the realisation of the amount could be initiated invoking Section 45-A (2) and Section 45-B of the Act.[2] Section 75 provides remedy to the aggrieved party. Therefore, if the employer feels aggrieved, he can approach the Insurance Court for its decision.[3]

In *Employees' State Insurance Corporation* v. *Hari Hazara*,[4] it was held that in case of injuries covered by the Schedule, the extent of loss of earning capacity need not be investigated inasmuch as the relevant item in the schedule would finally determine the question. But in case of injuries not covered by the Schedule, the extent of loss of earning capacity is to be decided on evidence and the opinion of the Medical Board in this regard will be final and binding between the parties and the Tribunal must pass an award in conformity with the decision of the Medical Board.

Section 75(3) bars jurisdiction of a Civil Court to deal with any matter which is to be decided by the Insurance Court. The arrangement of Sections 74 and 75 clearly shows that the Insurance Court is to be established first and the jurisdiction of the Civil Court is ousted in consequence of the establishment of that Court. Thus, the existence of the Employees' Insurance Court is a necessary condition precedent to bring into play the provisions of Section 75(3) so as to oust the jurisdiction of the Civil Court.[5]

It was held in *Regional Director, E.S.I.C. Orissa* v. *Revenue Divisional Commissioner, Central Division, Cuttack & others*,[6] that once the Insurance Court, on a dispute being raised before it, determines the liability of the principal employer, both the Corporation and the employer would be bound by the same subject to the decision reaching finality after appeal to the High Court. In the absence of such a decision, the decision of the Sub-Divisional Judicial Magistrate would not be determinative of the issue and would not oust the jurisidction of the Corporation to levy liability.

In *E.S.I. Corpn., Bhopal* v. *Central Press*,[7] it was held by the Supreme Court that in cases of the omission by the employer to maintain records in accordance with Section 44 of the Act, the Corporation should itself determine the amount of contributions and then make a demand under Section 45-A of the Act. If the employer refuses to comply with the demand so made, the matter can come up before the Employees' Insurance Court under Section 75 of the Act. The Court should give the Corporation a direction to perform its duty where it considers that this should be performed by the Corporation. It cannot decline to perform its own duty because the Corporation has failed to discharge its function.

Section 76. Institution of proceedings.—All proceedings shall be instituted in the Employees' Insurance Court appointed for the local area in which the insured person was working at the time the question or dispute arose. The State Government has the power to transfer any proceeding *suo motu* or on the motion of Employees' Insurance Court from one Court to another.

If the Employees' Insurance Court is satisfied that any matter pending for decision

1. *E.S.I. Corporation* v. *Asian Paints India Ltd.*, (1982) 2 LLJ 416 (Bom).
2. *Regional Director E.S.I. Trichur* v. *Marikka Engrs. Ltd.*, (1982) 1 LLJ 59 (Kerala).
3. *Ibid.*
4. (1989) 2 Lab LJ 415 (Cal).
5. *E.S.I. Corporation* v. *Himatram Ramdas*, 1970 Lab IC 240 (Guj).
6. (1992) 2 Lab LJ 253 (Orissa).
7. AIR 1977 SC 139.

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before it can be more conveniently decided by any other Employees' Insurance Court in the same State, it may transfer that matter for disposal to that Court. Where any matter is so transferred that transferring Court shall send all relevant and connected records to that Court. The exercise of power of transfer by the Employees' Insurance Court shall be regulated by the rules made by the State Government.

So, also the State Government may transfer any matter pending before any Employees' Insurance Court to any such court in another State with the consent of the Government of that State. Any court, to which any matter is transferred either by the Employees' Insurance Court or by the State Government, shall deal with it in the same manner as if it has been originally instituted in it.

Section 77. Commencement of proceedings.—Any proceeding before an Employees' Insurance Court shall be commenced by an application. Every such application shall be made within three years from the date on which the cause of action arose. The form of application if any, and particulars required to be furnished with the application shall be prescribed by the State Government in consultation with the Corporation. The rules shall be framed by the Government of each State.

The cause of action for a proceeding shall be deemed to have arisen according to the explanation attached to Section 77 of the Act. Sub-section 1-A and explanation attached thereto introduces the principle of cause of action and the period of limitation for making an application before the Employees' Insurance Court.

For the purposes of Section 77(1-A) a claim has to be made within a period of twelve months after it became due. This rule applies in respect of—

(i) a claim for benefit by insured person ; or

(ii) a claim for dependant's benefit by the dependants of the injured person.

A claim after the said period can be made if the Employees' Insurance Court on reasonable grounds allows it to do so.

For the purposes of sub-section (1-A) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time. Provided that no claim shall be made by the Corporation after five years of the period to which the claim relates.

So also for the purposes of sub-section (1-A) the cause of action in respect of a claim by the principal employer for recovering contributions from an immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the Corporation under the regulations.

Sub-section (2) provides that every such application shall be in such form and shall contain such particulars and shall be accompanied by such fee, if any, as may be prescribed by rules made by the State Government in consultation with the Corporation.

The expression 'cause of action' means all the essential facts constituting the right and the infringement.[1] It also means the fact or a combination of facts which gives rise to a right of action, which means the right of suing in a court for relief.

The condonation of delay in instituting a proceeding on reasonable grounds is permitted under the Act. In *K.K. Beri & Co.* v. *E.S.I. Co.*[2] the Punjab High Court has held that it is difficult to subscribe in an unqualified manner to the view, that delay in Government offices can never, as a general rule, constitute a relevant consideration in determining the sufficiency of cause for condoning delay, each case must depend on its own circumstances and the court has to determine in a practical way as to how far a

1. *Sher Ali Mirdha* v. *Trap Ali*, AIR 1942 Cal 407.
2. (1962) 1 LLJ 579.

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litigant has been reasonably diligent in prosecuting his case. Thus to justify the failure or omission to make an application within the period of limitation and to make out a case for condonation of delay, it is incumbent on the party to place cogent material on record. Discretion to admit an application beyond the prescribed period of limitation is, as is well established, judicial and must be exercised on well recognised principles.[1]

Section 77 (1-A) only prescribes the period of limitation for an application under Section 75 and not for all claims under the Act. This limitation period does not apply to an action under Section 45-A because that has not been the intention of the legislature. Though Section 77(1-A) was introduced by the same amending Act as Section 45-A but the legislature did not make it applicable to Section 45-A.[2]

Section 78. Power of Employees' Insurance Court.—The Employees' Insurance Court shall have the powers of a Civil Court for the following purposes :

(i) summoning and enforcing the attendance of a witness,

(ii) compelling the discovery and production of documents and material objects,

(iii) administering oath and recording evidence.

The Employees' Insurance Court shall be deemed to be a Civil Court within the meaning of Section 195 of the Criminal Procedure Code. It shall follow the procedure prescribed by rules made by the State Government. That means, it is not necessary that the same set of rules should be followed by Employees' Insurance Court in different States. If there are no statutory rules prescribing the procedure, the Court will follow the rule of natural justice.

All costs incidental to any proceeding before such Court shall, subject to the rules made by the State Government, be in the discretion of the Court. The Court has power to allow cost incidental to proceedings. Any order of the Employees' Insurance Court shall have the sanctity of a decree passed by a Civil Court. In other words, it shall be enforceable in the same manner as a decree passed in a suit by a Civil Court.

Natural Justice.—It is difficult to explain the meaning of the expression 'natural justice', with sufficient precision. It has different connotation in different context.[3] One of the principles of natural justice is that no decision against a party can be made by a judicial or quasi-judicial authority without giving him an effective opportunity of meeting the allegations made against him. In other words he must have a notice of allegations made against him and also a reasonable opportunity to be heard in his defence. It implies the following three principles, namely :—

(i) No person can be a judge in his own case.[4]

(ii) No person can be condemned unheard,[5]

(iii) The decision must be made in good faith.[6]

The rules of natural justice are applied by the Employees' Insurance Courts only when there are no statutory rules laying down the procedures for the guidance of these Courts. A good deal of the provisions of the Civil Procedure Code are applicable to the Employees' Insurance Court.

Section 79. Appearance by Legal Practitioner.—The following parties can appear on behalf of any person before the Employees' Insurance Court :—

(i) a legal practitioner ;

(ii) an officer of registered Trade Union, authorised in writing by such

1. (1962) 1 LLJ 579.
2. *E.S.I. Corpon.* v. *Asian Paints India Ltd.*, (1982) 2 LLJ 416 (Bom).
3. *Rex.* v. *Local Governments Board, Ex Parte Arlidge*, (1914) 1 KB 160.
4. *Moti Lal* v. *State of U.P.*, 1951 All 257 (FB).
5. *Horn* v. *Minister of Health*, (1937) 1 KB 164.
6. *Karunamay Nath* v. *State of Madhya*, (1956) 2 LLJ 347.

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person ; or

(iii) any person authorised in writing with the permission of the Court.

But where a person is required to appear before such Court for the purpose of his examination as a witness, he shall appear personally, and in all other cases he may be represented by any of the parties as stated above.

Section 81. Reference to High Court.—Section 81 of the Act authorises the Employees' Insurance Court to submit any question of law for the decision of the High Court. Whenever any such reference is made, the matter involving the determination of such question of law shall be kept pending before the Court. When the question of law is considered and decided by the High Court the decision shall be communicated to the Court making such reference, which shall decide that matter in conformity with the decision of the High Court.

Section 82. Appeal.—Clause (1) of Section 82, of the Act provides that there shall be no right of appeal from an order of an Employees' Insurance Court except where appeal is allowed under this section. The right of appeal is normally creature of a statute. There is no inherent right of appeal. Therefore an appeal lies only when a provision to that effect is expressly made in a statute. Under this section an appeal shall lie to the High Court from any decision of the Employees' Insurance Court if it involves a substantial question of law. No appeal can be entertained under Section 82(2) on a pure question of fact.[1] The period of limitation for an appeal is sixty days. It is further provided that the provisions of Sections 5 and 12 of the Limitation Act, 1963 shall apply to appeals under Section 82 of the Act.

In *E.S.I. Corpn., Hyderabad* v. *Southern Eastern Roadways*[2] the respondent was a transport company engaged in the business of transporting goods, with its head office at Calcutta and having its branches all over India in different States. One of such branch offices was at Hyderabad. All the branches were controlled administratively and financially by the head office at Calcutta. Each branch is a separate and independent unit having no connection with other branches and at no time 20 or more persons were employed for wages by the branch office at Hyderabad. Corporation issued notice to the respondent company demanding contributions. It was held that each branch is an off-shoot of the head office and cannot be considered to have an independent entity as all the transaction ultimately funnel into head office. Each branch is a component of the main office and all the branches are miniature of the main office and as such cannot be considered as separate and independent units. Therefore, contribution was payable.

What is substantial question of law.—It is pertinent to note that an appeal is allowed only when some substantial question of law is involved and not otherwise. The expression 'substantial question of law', means a substantial question of law as between the parties in the case involved and not merely a question of general importance.[3] The question whether a person is employee or not is a question which has to be decided on an assessment of facts and therefore it cannot be treated as a substantial question of law.[4] Where the decision in any case is not based on any evidence but on mere presumption and inferences not warranted by facts, a question of law is said to be involved. The question of construction of a document which forms the basis of a claim in a proceedings is always a question of law and when, in view of the character of the document, a substantial question of law is involved, an appeal shall lie.[5] When the

1. *E.S.I. Corporation, Madras* v. *A. Zackaria*, (1970) 2 LLJ 96.
2. (1983) 2 LLJ 396 (AP).
3. *Deputy Commissioner, Hardoi* v. *Ramkrishna Naraindas*, AIR 1953 SC 521.
4. *Employees' State Insurance Corporation* v. *Cheeran's Auto Agencies*, (1992) 1 Lab LJ 704 (Kerala).
5. *Lord Krishna Sugar Mills Workers Union* v. *Lord Krishna Sugar Mills Ltd.*, 3 FLR 363.

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question is whether certain facts give rise to a legal right or liability, the inference is one of law and the question of such inference is a question of law.[1] Whether the interpretation of a particular order is a question of fact, or a question of law, or a mixed question of fact and law depends on the circumstances of each particular case. Inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or mixed question of law and fact.[2] Where a substantial question of law is involved, the High Court may consider the case as whole on point of fact as well as on point of law.[3] Mr. Justice M.C. Chagla has observed that to support a right of appeal under this section there must not only be a question of law involved but a substantial question of law as between the parties in the case involved. He has further observed that :

> "If there is a well established principle of law and the principle of law is applied to a given set of facts that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest Court".[4] The liability of the employer to reimburse the State Insurance Corporation is a substantial question of law and specially when the finding of the trial Court is vitiated because the relevant evidence on the record has been kept out of consideration and its decision is not supported by the evidence, an appeal will lie.[5]

It has been held in *Said Ahmad* v. *N.W. Railway*,[6] that the question whether there is sufficient cause for extension of limitation to enable the application for compensation to be heard on the merits is a substantial question of law. The question, that claims for employees' contribution is barred by limitation under Section 80 of the Act (now repealed), is not purely question of law but may require evidence to substantiate it, cannot be raised for the first time in appeal.[7]

The question whether a part of a machinery is dangerous is one of fact and will depend on whether there is a substantial probability that accidents will result from the use of machinery. Therefore, it being a question of fact and not a question of law, no appeal would lie. Such a question may be a question of law only where the Court commits an error in construing the word dangerous.[8]

In *Orient Paper Mills* v. *Regional Director, E.S.I.C.*,[9] the appellant mill is a factory engaged in manufacturing paper and paper board and is covered by the Act. It was held that the employees engaged for cleaning, gardening and repairing of the buildings are engaged in work which is incidental and is connected with the work of the appellant and are, therefore, employees under Section 2(9) of the Act. The Insurance Court has held them to be employees. Since the question whether certain employees are covered under the definition of 'employee' is a pure question of fact, no appeal was held to lie under Section 82 of the Employees' State Insurance Act.

It was held in *E.S.I. Corporation, Hyderabad* v. *Andhra Pradesh State Electricity Board Hymayatnagar*,[10] that the High Court has the power under Article 226 or 227 of the Constitution, in the exercise of its supervisory jurisdiction to consider the vires of

1. *Shri Meenakshi Mills Ltd.* v. *Their Workmen*, AIR 1958 SC 153.
2. *Meenakshi Mills Ltd.* v. *Commissioner, Income Tax*, AIR 1957 SC 49.
3. *Gouri Kerikar Bhakat* v. *Radhakrishen Mills*, AIR 1933 Cal 220.
4. *Kaikushuroo Ghiara* v. *C.P. Syndicate Ltd.*, AIR 1949 Bom 134.
5. *Shri Charanjit* v. *Regional Director*, 1969 Lab IC 1295 (Punj).
6. AIR 1940 Lah 227.
7. *Tarachand Mohan Lal* v. *E.S.I. Corporation*, AIR 1971 A & N 65.
8. *J.B. Managharam and Co.* v. *E.S.I. Corporation*, AIR 1960 MP 110.
9. (1995) 1 LLJ 1115 (Orissa).
10. 1970 Lab IC 921 (AP).

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any rule made under the Act if it is relevant in a case before it. The Court has power to determine as to whether certain specified formalities for making a void rule were followed by the delegated authority or whether the rule making authority had in fact any power to make rule or the subordinate authority has transcended the limits set out by the Act while delegating the power to make rules.

In *E.S.I. Corporation* v. *Harcharan Singh*,[1] it was contended that an appeal under Section 82(2) lies only against final order and interlocutory orders were not covered by it. It was held that Section 82(2) was not so limited as to cover only cases of final orders, instead it covers appeal from interlocutory orders also ; further more an order dismissing application for setting aside dismissal for default of claim under Section 75 is a final order.

Appeal to Supreme Court.—Article 136 of the Constitution empowers the Supreme Court to grant special leave to appeal from any judgment decree, determination, sentence or order on any cause or matter passed or made by any Court or Tribunal in the territory of India. Decisions of Employees' State Insurance Court are in certain cases appealable to the High Court. But there is no prvision for appeal from the decisions of special Tribunal constituted under Section 73-B of the Act. Similarly the appropriate Government may in suitable cases exempt a particular person or class of persons and a factory or establishment from the operation of this Act. The special Tribunal, constituted under Section 73-B and any Government doing an act in the exercise of powers conferred by Sections 87 and 88 of the Act is a Tribunal. The Supreme Court can grant special leave to appeal from any such decision.

Before an appeal can be entertained by the Supreme Court under Article 136, two conditions have to be satisfied : the order impugned must be an order of a judicial or quasi-judicial character and should not be purely an administrative or executive order and the said order should have been passed either by a Court or a Tribunal in the territory of India. It is difficult to lay down any definite and precise test for determining the character of a body which is called upon to adjudicate upon matter brought before it.

In case of a finding of fact arrived at by the Employees' State Insurance Court and confirmed in appeal by the High Court, the Corporation must not go in a special leave to appeal petition when no substantial question of law is involved. The Supreme Court cautioned that a time has come to cry a halt to this litigious mentality on the part of a public corporation set up to achieve the goals enumerated in the Constitution.[2]

In *Indo-China Steam Navigation Co.* v. *Jasjit*,[3] it was said that sometimes in deciding such a question courts enquire whether the body or authority whose status or character is the subject-matter of the enquiry, is clothed with the trappings of a Court, can it compel witnesses to appear before it and administer oath to them, is it required to follow certain rules of procedure, is it bound to comply with the rules of natural justice as it is expected to deal with the matters before it fairly, justly and on the merits and not be guided by subjective consideration ; in other words, is the approach, which it is required to adopt a judicial or quasi-judicial approach. If all or some of the important tests in that behalf are satisfied the proceedings can be characterised as judicial proceedings and the test of trapping may be said to be satisfied. Another test of importance is whether the body or authority has been constituted by the State and the State has conferred on it its inherent judicial power. If it appears that such a body or authority has been constituted by the Legislature and on it has been conferred the State's

1. 1969 MPLJ 550.
2. *Employees' State Insurance Corporation* v. *Ameer Hasan*, (1981) 1 LLJ 164.
3. AIR 1964 SC 1140.

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inherent judicial power, that would be a significant, if not a decisive, indication that the said body or authority is a tribunal.

In *Associated Cement Co. Ltd.* v. *P.M. Sharma*,[1] it was held that in determining the status of an authority dealing with the disputes it should be enquired whether the power conferred on the said authority or body could be said to be judicial power conferred on it by the State by means of a statute or statutory rule. In other words the test in determining the status of any authority in the context of Article 136(1) is whether or not inherent judicial power of the State has been transferred to it. Judicial functions are exercised by the court also. It is not possible or even expedient to attempt to describe exhaustively the features which are common to the Tribunals and the Courts, and features which are distinct and separate. The basic and fundamental feature which is common to both the Courts and the Tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State.[2] Therefore any body or authority that satisfies the requirements of a Tribunal or Court is within the scope of Article 136 of the Constitution, and the provisions of special leave to appeal under that Article shall apply to the decision of any such authority.

Section 83. Stay of payment pending appeal.—The provision to withhold the payment of compensation under Section 83 pending an appeal is very limited. If the Corporation has appealed against an order of the Employees' Insurance Court, that court has a discretion to withhold the payment of compensation directed to be paid by the order appealed against. But if the High Court before which any such appeal is pending directs the Employees' Insurance Court to withhold the payment of compensation, that court shall have to comply with the order because no discretion is conferred in that case. Thus the High Court may pass any interim order that it thinks proper to meet the ends of justice, pending the decision of appeal.

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1. (1965) I LLJ 433 (SC).
2. (1965) I LLJ 433 (SC).

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CHAPTER VII
PENALTIES

Section 84. Punishment for false statement.—The following acts are made offence under Section 84 of the Act :

(1) knowingly making any false statement ;

(2) knowingly making any false representation ;

(3) knowingly causing any false statement to be made ; or

(4) knowingly causing any false representation to be made.

It is further provided that the false statement or false representation made or caused to be made must be for any of the following purposes :

(1) to cause any increase in any payment to be made under the Act ;

(2) to cause any increase in any benefit payable under the Act ;

(3) to cause any payment or benefit to be made where no payment or benefit is authorised under this Act ;

(4) to avoid any payment to be made by himself under the Act ;

(5) to enable any other person to avoid any payment under the Act.

The penalty provided by Section 84 for any offence under that section is imprisonment for a period which may extend to six months, or fine not exceeding two thousand rupees, or both :

Provided that where an insured person is convicted under this section, he shall not be entitled for any cash benefit under this Act for such period as may be prescribed by the Central Government.

Section 85. Punishment for failure to pay contributions.—The following failures can be penalised under Section 85 of the Act :

(a) If any person fails to pay any contribution which under the Act he is liable to pay ; or

(b) If any person deducts or attempts to deduct from the wages of an employee the whole or any part of the employer's contribution ; or

(c) If any person in contravention of Section 72 reduces the wages or any privileges or benefits admissible to an employee ; or

(d) If any person in contravention of Section 73 or any regulation dismisses, discharges, reduces or otherwise punishes an employee ; or

(e) If any person fails or refuses to submit any return required by the regulation, or makes a false return ; or

(f) If any person obstructs any Inspector or other official of the Corporation in the discharge of his duties ; or

(g) If any person is guilty of any contravention of or non-compliance with any of the requirements of this Act or the rules or the regulations in respect of which no special penalty is provided.

Any person who commits an offence under clause (a) shall be punishable, with imprisonment for a term which may extend to three years but—

(a) which shall not be less than one year, in case of failure to pay the employees' contribution which has been deducted by him from the employees' wages and shall also be liable to fine of ten thousand rupees ;

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(b) which shall not be less than six months, in any other case and shall also be liable to fine of five thousand rupees :

Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term ;

(ii) where he commits an offence under any of the clauses (b) to (g) (both inclusive), with imprisonment for a term which may extend to one year or with fine which may extend to four thousand rupees, or with both.

For contravention of Section 40 of the Employees' State Insurance Act, though it is punishable under Section 85(a) and (g) proceedings under Section 403/406 of the Indian Penal Code are maintainable.[1] The Director of a Limited Company is an owner and as such the principal employer, within the meaning of Section 2(17) of the Act. Therefore, the Directors may be held liable for contravention of the provisions of the Act.[2]

The essence of offence under Section 85(a) is non-payment of contribution and the time when it should be paid is fixed only for the purpose of taking action after that time is over. It was held in *Siddaraht Kejriwal* v. *Regional Director, E.S.I.C.*,[3] that so long as the contribution is not paid the offence continues. Considering the object to be achieved by the Act, the contravention relating to payment of contribution is a continuing offence and the bar of limitation would not be applicable to such offence.

Section 85-A. Enhanced punishment in certain cases after previous conviction.—Whoever, having been convicted by a Court of an offence punishable under this Act, commits the same offence shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to two years and with fine of five thousand rupees :

Provided that where such subsequent offence is for failure by the employer to pay any contribution which under this Act he is liable to pay, he shall, for every such subsequent offence, be punishable with imprisonment for a term which may extend to five years but which shall not be less than two years and shall also be liable to fine of twenty five thousand rupees.

The Legislature, with good reasons, has prescribed certain minimum norms of punishment and no discretion is left with the Courts to show sympathy thereafter and impose a lesser sentence. Therefore where after a previous conviction the offence is repeated the minimum punishment prescribed must be imposed. The provisions of Section 85-A are mandatory.[4]

Section 85-B. Power to recover damages.—Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations :

Provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard :

Provided further that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) subject to such terms and conditions as may be specified in regulations.

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1. *Nathmull* v. *Salil Kumar*, AIR 1971 Cal 93.
2. *B.M. Chatterjee* v. *State of West Bengal*, AIR 1970 Cal 290.
3. (1995) 1 LLJ 734 (Karnataka).
4. *E.S.I.C.* v. *S.K. Agarwal & ors.*, (1992) 1 Chandigarh (Bom).

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(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue or under Section 45-C to Section 45-I.

It was held in *Beama Manufacturers (P) Ltd.* v. *Regional Director, E.S.I. Corpn.*[1] that in the matter of levy of damages under Section 85-B the authority concerned is duty bound to act in a judicious manner and the order must disclose that there was in fact, an application of mind on the part of the authority to the relevant facts and circumstances of the case. Failure on the part of the employer to offer an explanation does not absolve the authority from this obligation.

In *Madras Hotel Ashoka (Pvt.) Ltd.* v. *E.S.I.C.*[2] it was held that it is not possible to laydown any hard and fast rule as to what are the matters that would have relevance in fixing the quantum of damages under Section 85-B of the Act. If the party is able to satisfy the Regional Director that the default has been due to circumstances beyond his control or despite his best efforts he could not make the contribution in time, that would certainly be a mitigating circumstance. The Insurance Court has discretionary power to evaluate the entire matter and if it is satified that there are extenuating circumstances, it can dispense with the recovery of damages or reduce the quantum of damages or afford other relief deserving in the circumstances.

Section 85-C. Power of Court to make orders.—Where an employer is convicted of an offence for failure to pay any contribution payable under this Act, the court may, in addition to awarding any punishment, by order, in writing, require him within a period specified in the order (which the court may, if it thinks fit and on application in that behalf, from time to time, extend), to pay the amount of contribution in respect of which the offence was committed and to furnish the return relating to such contributions.

(2) Where an order is made under sub-section (1), the employer shall not be liable under this Act in respect of the continuation of the offence during the period or extended period, if any, allowed by the court, but if, on the expiry of such period or extended period, as the case may be, the order of the court has not been fully complied with, the employer shall be deemed to have committed a further offence and shall be punishable with imprisonment in respect thereof under Section 85 and shall also be liable to pay fine which may extend to one thousand rupees for every day after such expiry on which the order has not been complied with.

Section 86. Prosecution.—Section 86 of the Act deals with the prosecution for any offence under the Act. No prosecution under this Act shall be instituted except by or with the previous sanction of the Insurance Commissioner or of such other Officer of the Corporation as may be authorised in this behalf by the Director General of the Corporation.

(2) No Court inferior to that of Metropolitan Magistrate or Judicial Magistrate of the first class shall try any offence under this Act.

(3) No court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof.

In order that the Court may take notice of an offence, the complaint should be made to a Court of competent jurisdiction. Under Section 106 of the Indian Factories Act a complaint should be made within three months of the date on which the commission of the alleged offence came to the knowledge of the Inspector. The section does not require that cognizance of the offence itself must be taken within three months.[3]

1. (1991) 2 Lab LJ 29 (Madras).
2. (1994) 1 LLJ 495 (Mad).
3. *Gopalan Sakseria* v. *State of U.P.* (1956) 1 LLJ 11.

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Section 86-A. Offences by Companies.—(1) If the person committing an offence under this Act is a company, every person, who at the time the offence was committed was incharge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any Director or Manager, Secretary or the Officer of the Company, such Director, Manager, Secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(i) "company" means any body corporate and includes a firm and other associations of individuals ; and

(ii) "director" in relation to—

(a) a company, other than a firm, means the Managing Director or a whole time director ;

(b) a firm means a partner in the firm.

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CHAPTER VIII
MISCELLANEOUS

Section 87. Exemption of a factory or establishment.—Section 87 of the Act may be analysed as follows :

(1) The authority to grant exemption from the operation of this Act is vested in the appropriate Government.

(2) Exemption may be granted to—

(i) any factory or establishment, or

(ii) any class of factories or establishments.

(3) Exemption can, at one time, be granted for a maximum period of one year.

(4) Any exemption granted under this section shall be notified by a notification in the Official Gazette.

(5) The appropriate Government while granting any exemption can impose any terms and conditions upon the factory or establishment.

(6) Any exemption so required can be renewed in the like manner for a maximum period of one year at a time.

(7) Before any exemption could be granted under this section the Corporation must be given an opportunity to make any representation it may like. The representation made by the Corporation has to be considered by the Government before granting any exemption.[1]

Section 88. Exemption of persons or class of persons.—Under Section 88 the appropriate Government is authorised to exempt any person or class of persons from the operation of this Act. Section 88 may be analysed as follows :

(1) Authority to grant exemption vests in the appropriate Government ;

(2) Any exemption so granted must be notified in the Official Gazette ;

(3) The appropriate Government may exempt any person or class of persons ;

(4) Such person or class of persons must be working in a factory or establishment to which this Act applies ;

(5) Any exemption so granted shall be accompanied with such conditions as the appropriate Government may think fit to impose.

Section 89. Corporation to make representation.—Before any exemption could be granted by the Government under Section 88 a reasonable opportunity has to be given to the Corporation to make any representation with regard to such exemption. Any representation so made by the Corporation has also to be considered by the Government before granting such exemption.

Where application is made by the employer and union under Section 88 seeking exemption from provisions of the Act, it is just and proper that parties concerned should be heard before deciding whether benefits provided by the employer are substantially similar or superior to the benefit provided under the Act.[2]

Section 90. Exemption of factories or establishments belonging to Government or any local authority.—The appropriate Government may exempt any factory or establishment belonging to any local authority from the operation of this Act,

1. *See* Section 89 of E.S.I. Act, 1948.
2. *Orissa Industries Ltd.* v. *Union of India*, (1992) 1 Lab LJ 182 (Orissa).

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subject to the following conditions :

(1) The appropriate Government must consult the Corporation.

(2) Exemption must be notified in the Official Gazette.

(3) Exemption shall always be subject to the conditions imposed by the Government.

(4) Exemption shall be in order only if the employees in any such factory or establishment are already in receipt of benefits substantially similar or superior to the benefits provided under this Act.

Section 91. Exemption from one or more provisions of the Act.—Section 91 of the Act empowers the appropriate Government to grant exemption from one or more provisions of the Act. Exemption may relate to any employee or class of employees in any factory or establishment, or class of factories or establishments. Notification of the exemption in the Official Gazette is necessary. The appropriate Government must also obtain the consent of the Corporation before granting any exemption.

Section 91-A. Operation of Exemption.—Any exemption granted under Sections 87, 88, 90 or 91 in respect of any person or class of persons working in any factory or establishment, etc. may be enforced either prospectively or retrospectively. The date of its enforcement has to be specified.

Section 91-B. Misuse of benefits.—If the Central Government is satisfied that the benefits under this Act are being misused by insured persons in a factory or establishment, that Government may, by order, published in the official Gazette, disentitle such persons from such of the benefits as it thinks fit :

Provided that no such order shall be passed unless a reasonable opportunity of being heard is given to the concerned factory or establishment, insured persons and the trade unions registered under the Trade Union Act, 1926 having members in the factory or establishment.

Section 91-C. Writing off of losses.—Subject to the conditions as may be prescribed by the Central Government, where the Corporation is of opinion that the amount of contribution, interest and damages due to the Corporation is irrecoverable, the Corporation may sanction the writing off finally of the said amount.

Section 92. Power of the Central Government to give directions.—Section 92(1) of the Act authorises the Central Government to give directions to the State Government regarding execution of this Act in States.

(2) The Central Government may, from time to time, give such directions to the Corporation as it may think fit for the efficient administration of the Act, and if any such direction is given, the Corporation shall comply with such direction.

Section 93. Corporation Officer and servants to be public servants.—All Officers and servants of the Corporation shall be deemed to be public servants within the meaning of Section 24 of the Indian Penal Code.

Section 93-A. Liability in case of transfer of establishment.—Where an employer, in relation to a factory or establishment, transfers that factory or establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the factory or establishment is so transferred shall jointly, and severally be liable to pay the amount due in respect of any contribution or any other amount payable under this Act in respect of the periods upto the date of such transfer :

Provided that the liability of the transferee shall be limited to the value of the assets obtained by such transfer.

Section 94. Contribution to Corporation to have priority over other debts.—Section 94 of the Act provides that any contribution due to the Corporation or

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any other amount payable under this Act shall have priority over other debts in case of an order of adjudication of insolvency or the company being wound up subject to the conditions provided in the section. Priority will be given to all such amount if it were payable before the date of the order of adjudication of insolvent or the date of the winding up. In case of the distribution of the property of insolvent or the distribution of the assets of a company being wound up any amount payable as mentioned above shall be deemed to be included among the debts to be paid in priority to all other debts as under :

(a) Section 39 of the Presidency Towns Insolvency Act, 1909 ;

(b) Section 61 of the Provincial Insolvency Act, 1920 ;

(c) Section 530 of the Companies Act, 1956 ;

(d) Any law relating to insolvency in force in the territories which immediately before the 1st November, 1956, were comprised in a Part B State.

Section 94-A. Delegation of powers.—The power of the Corporation to delegate its powers is regulated by Section 94-A of the Act :—

(1) The Corporation may delegate all or any of the powers and functions exercised or performed by the Corporation.

(2) Delegation may be made to any officer or authority subordinate to the Corporation.

(3) The exercise of the delegated powers of such officer or authority shall be subject to the conditions laid down by the Corporation.

Section 94-A authorises the delegation by the Standing Committee of all or any of the powers exercised by it. But the delegation of powers and functions by the Standing Committee is subject to any regulation made by the Corporation in that behalf. Other provisions relating to the delegation are similar to that of the delegation by the Corporation. No regulation, governing or controlling the delegation by the Standing Committee have so far been framed by the Corporation. Therefore, in absence of such regulations, the Standing Committee can exercise its power of delegation as it thinks proper.

It was held in *Sahni Silk Mills (P) Ltd. & another* v. *E.S.I. Corpn.*,[1] that the power to impose and recover damages is vested in the Corporation. The Corporation is empowered to delegate its power by virtue of Section 94-A. In this case the power was delegated by the Corporation to Director General who in turn was empowered to authorise any other officer to exercise that power. The Director General sub-delegated it to Regional Directors and the sub-delegation was held to be bad in law.

Section 95. Power of Central Government to make rules.—(1) The Central Government may, after consultation with the Corporation and, subject to the condition of previous publication, make rules not inconsistent with this Act for the purpose of giving effect to the provisions thereof.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the limit of wages beyond which a person shall not be deemed to be an employee ;

(ab) the limit of maximum monthly salary for the purpose of sub-section (1) of Section 17 ;

(ac) the manner in which appointments and elections of members of the Corporation, the Standing Committee and the Medical Benefit Council shall be made ;

1. (1994) 2 LLJ 1105 (SC).

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(b) the quorum at meetings of the Corporation, the Standing Committee and the Medical Benefit Council and the minimum number of meetings of those bodies to be held in a year ;

(c) the records to be kept of the transaction of business by the Corporation, the Standing Committee and the Medical Benefit Council ;

(d) the powers and duties of the Director General and the Financial Commissioner and the conditions of their service ;

(e) the powers and duties of the Medical Benefit Council ;

(ea) the types of expenses which may be termed as administrative expenses the percentage of income of the Corporation which may be spent for such expenses ;

(eb) the rates of contributions and limits of wages below which employees are not liable to pay contribution ;

(ec) the manner of calculation of the average daily wage ;

(ed) the manner of certifying the certificate to recover amount by the Recovery Officer ;

(ee) the amount of funeral expenses ;

(ef) the qualifications, conditions, rates and period of sickness benefit, maternity benefit, disablement benefit and dependants' benefit ;

(eg) the conditions for grant of medical benefits for insured persons who cease to be in insurable employment on account of permanent disablement ;

(eh) the conditions for grant of medical benefits for persons who have attained the age of superannuation ;

(ei) the manner in which and the time within which appeals may be filed to Medical Appeal Tribunals or Employees' Insurance Courts ;

(f) the procedure to be adopted in the execution of contracts ;

(g) the acquisition, holding and disposal of property by the Corporation ;

(h) the raising and repayment of loans ;

(i) the investment of the funds of the Corporation and any provident or other benefit fund and their transfer or realisation ;

(j) the basis on which the periodical valuation of the assets and liabilities of the Corporation shall be made ;

(k) the bank or banks in which the funds of the Corporation may be deposited, the procedure to be followed in regard to the crediting of moneys accruing or payable to the Corporation and the manner in which any sums may be paid out of the Corporation funds and the officers by whom such payment may be authorised ;

(l) the accounts to be maintained by the Corporation and the forms in which such accounts shall be kept and the times at which such accounts shall be audited ;

(m) the publication of the accounts of the Corporation and the report of auditors, the action to be taken on the audit report, the powers of auditors to disallow and surcharge items of expenditure and the recovery of sums so disallowed or surcharged ;

(n) the preparation of budget estimates and of supplementary estimates and the manner in which such estimates shall be sanctioned and published ;

(o) the establishment and maintenance of provident or other benefit fund for officers and servants of the Corporation ; [* * * *] ;

(2a) the period of non-entitlement for cash benefit in case of conviction of an

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insured person ; and

(p) any matter which is required or allowed by this Act to be prescribed by the Central Government.

(2A) The power to make rules conferred by this section shall include the power to give retrospective effect, from a date not earlier than the date of commencement of this Act, to the rules or any of them but no retrospective effect shall be given to any rule so as to prejudicially affect the interest of any person other than the Corporation to whom such rule may be applicable.

(3) Rules made under this section shall be published in the Official Gazette and thereupon shall have effect as if enacted in this Act.

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Section 96. Power of State Government to make rules.—(1) The State Government may, after consultation with the Corporation and, subject to the condition of previous publication, make rules not inconsistent with this Act in regard to all or any of the following matters, namely :—

(a) the constitution of Employee's Insurance Court, the qualifications of persons who may be appointed Judges thereof, and the conditions of service of such Judges ;

(b) the procedure to be followed in proceedings before such Court and the execution of orders made by such Courts ;

(c) the fee payable in respect of applications made to the Employees' Insurance Court, the costs incidental to the proceedings in such Court, the form in which applications should be made to it and the particulars to be specified in such applications ;

(d) the establishment of hospitals, dispensaries and other institutions, the allotment of insured persons or their families to any such hospital, dispensary or other institution ;

(e) the scale of medical benefit which shall be provided at any hospital, clinic, dispensary or institution, the keeping of medical records and the furnishing of statistical returns ;

(f) the nature and extent of the staff, equipment and medicines that shall be provided at such hospitals, dispensaries and institutions ;

(g) the conditions of service of the staff employed at such hospitals, dispensaries and institutions ; and

(h) any other matter which is required or allowed by this Act to be prescribed by the State Government.

(2) Rules made under this section shall be published in the Official Gazette and thereupon shall have effect as if enacted in this Act.

(3) Every rule made under this section shall be laid as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or, where such Legislature consists of one House, before that House.

Section 97. Power of Corporation to make regulations.—(1) The

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Corporation may, [* * * *] subject to the condition of previous publication, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation and for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :—

(i) the time and place of meetings of the Corporation, the Standing Committee and the Medical Benefit Council and the procedure to be followed at such meetings ;

(i-a) the time within which and the manner in which a factory or establishment shall be registered ;

(ii) the matters which shall be referred by the Standing Committee to the Corporation for decision ;

(iii) the manner in which any contribution payable under this Act shall be assessed and collected ;

(iiia) the rate of interest higher than twelve per cent on delayed payment of contributions ;

(iv) reckoning of wages for the purpose of fixing the contribution payable under this Act ;

(iv-a) the register of employees to be maintained by the immediate employer ;

(iv-b) the entitlement of sickness benefit or disablement benefit for temporary disablement on any day on which person works or remains on leave or on holiday and in respect of which he receives wages or for any day on which he remains on strike ;

(v) the certification of sickness and eligibility for any cash benefit ;

(vi) the method of determining whether an insured person is suffering from one or more of the diseases specified in the Third Schedule ;

(vii) the assessing of the money value of any benefit which is not a cash benefit ;

(viii) the time within which and the form and manner in which any claim for a benefit may be made and the particulars to be specified in such claim ;

(ix) the circumstances in which an employee in receipt of disablement benefit may be dismissed, discharged, reduced or otherwise punished ;

(x) the manner in which and the place and time at which any benefit shall be paid ;

(xi) the method of calculating the amount of cash benefit payable and the circumstances in which and the extent to which commutation of disablement and dependant's benefits, may be allowed and the method of calculating the commutation value ;

(xii) the notice of pregnancy or of confinement and notice and proof of sickness ;

(xiiia) specifying the authority competent to give certificate of eligibility for maternity benefit.

(xiib) the manner of nomination by an insured woman for payment of maternity benefit in case of her or her child's death ;

(xiic) the production of proof in support of claim for maternity benefit or additional maternity benefit ;

(xiii) the conditions under which any benefit may be suspended ;

(xiv) the conditions to be observed by a person when in receipt of any benefit and the periodical medical examination of such person ;

(xv) [* * *]

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(xvi) the appointment of medical practitioner, for the purposes of this Act, the duties of such practitioners and the form of medical certificates ;

(xvia) the qualification and experience which a person should possess for giving certificate of sickness ;

(xvib) the constitution of medical board and medical appeal tribunal ;

(xvii) the penalties for breach of regulation by fine (not exceeding two days' wages for a first breach and not exceeding three days' wages for any subsequent breach) which may be imposed on employees ;

(xviia) the amount of damages to be recovered as penalty :

(xviib) the terms and conditions for reduction or waiver of damages in relation to a sick industrial company ;

(xviii) the circumstances in which and the conditions subject to which any regulation may be relaxed, the extent of such relaxation, and the authority by whom such relaxation may be granted ;

(xix) the returns to be submitted and the registers or records to be maintained by the principal and immediate employers, the forms of such returns, registers or records, and the times at which such returns should be submitted and the particulars which such returns, registers and records should contain ;

(xx) the duties and powers of Inspectors and other officers and servants of the Corporation ;

(xxi) the method of recruitment, pay and allowances, discipline, superannuation benefits and other conditions of service of the officers and servants of the Corporation other than the Director General and Financial Commissioner ;

(xxii) the procedure to be followed in remitting contributions to the Corporation ; and

(xxiii) any matter in respect of which regulations are required or permitted to be made by this Act.

(2A) The condition of previous publication shall not apply to any regulations of the nature specified in clause (xxi) of sub-section (2).

(3) Regulations made by the Corporation shall be published in the Gazette of India and thereupon shall have effect as if enacted in this Act.

(4) Every regulation shall, as soon as may be, after it is made by the Corporation, be forwarded to the Central Government and that Government shall cause a copy of the same, to be laid before each House of Parliament, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

Section 98. Corporation may undertake duties in Part in States.—[*Repealed*].

Section 99. Medical care for the families of insured persons.—At any time when its funds so permit, the Corporation may provide or contribute towards the cost of medical care for the families of insured persons.

Section 99-A. Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order publish in the Official Gazette, make such provisions or give such directions, not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for

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removing the difficulty.

(2) Any order made under this section shall have effect notwithstanding anything inconsistent therewith in any rules or regulations made under this Act.

Section 100. Repeals and savings.—If, immediately before the day on which this Act comes into force in any part of the territories which, immediately before the 1st November, 1956, were comprised in a Part B State, there is in force in that Part any law corresponding to this Act, that law shall, on such day, stand repealed :

Provided that the repeal shall not affect—

(a) the previous operations of any such law ; or

(b) any penalty, forfeiture or punishment incurred in respect of any offence committed against any such law ; or

(c) any investigation or remedy in respect of any such penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed :

Provided further that subject to the preceding proviso anything done or any action taken under any such law shall be deemed to have been done or taken under the corresponding provision of this Act and shall continue in force accordingly unless and until superseded by anything done or any action taken under this Act.

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THE EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

CHAPTER I
PRELIMINARY

Object and Scope of the Act.—The long title of this Act is the Employees' Provident Funds, Family Pension Fund and Deposit Linked Insurance Fund Act, 1952. By an amendment of the year 1997 the words Family Pension Fund have been substituted by the words Pension Fund. Thus the word 'Family' has now been omitted. But the Act is known by short title The Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The object of the Employees' Provident Funds Act, is to provide for the institution of provident funds, pension fund and deposit linked insurance funds for employees in factories and other establishments. The principal duty is laid upon the employer to put the Provident Fund Scheme into operation and to make contribution of both the employees' and employer's share to the fund then and there and deduct the employees' share from their wages.[1] The Act extends to the whole of India except the State of Jammu and Kashmir. The Act and Scheme were enforced in the scheduled industries in November, 1952. There had been a persistent demand for extension of the E.P.F. Act to all categories of industrial workers and the Planning Commission and Tripartite Consultative Committees recommended for such extension. The Act was accordingly extended to many additional industries so as to cover millions of employees working in more than 4,000 factories by the end of March, 1957.

Employees' Provident Funds (Amendment) Act, 1956 empowered the Government to extend the Act to non-factory establishments. In view of the Amendment Act, 1976, this Act is now called Employees' Provident Funds and Miscallaneous Provisions Act, 1952. According to Section 1(3)(a) this Act applies to every establishment which is a factory engaged in any industry specified in Schedule 1, and in which twenty or more persons are employed. According to Section 1(3)(b) it shall also apply to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf. In exercise of this power conferred by the Act upon the Government the Act was extended on 30th April, 1957, to workers in plantations of tea, coffee, rubber, cardamom and pepper employing 50, or more workers. Proviso to sub-section (3) provides that the Central Government may after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette apply the provisions of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification. The number of employees specified by the notification by the Central Government as stated above may be even less than twenty. However, the provisions of this sub-section are subject to the provisions of Section 16 of this Act.

Sub-section (4) empowers the Central Provident Fund Commissioner to apply the

1. *Kumar Brothers (Bidi) Private Ltd.* v. *Regional Provident Funds Commissioner, Bihar,* (1968) Lab IC 1578 (Pat).

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provisions of this Act to any establishment. This may be done by a notification in the Official Gazette. Before applying the Act to any establishment the Central Provident Fund Commissioner must ensure that the employer and the majority of employees in relation to such establishment have agreed that the provisions of this Act should be made applicable to that establishment. The Commissioner may apply the provisions of this Act to that establishment on and from the date of such agreement or from any subsequent date specified in such agreement. The Provident Fund Commissioner may do so whether on an application made to it in this behalf or otherwise. The Commissioner may exercise power under this sub-section notwithstanding anything contained in sub-section (3) of this section or sub-section (1) Section 16 of this Act.

According to sub-section (5) an establishment to which this Act applies shall continue to be governed by this Act even if the number of persons employed therein at any time falls below twenty.

The expression 'any other establishment' in clause (b) of Section 1(3) is capable of interpretation that the reference is to any establishment that does not fall under clause (a) whether such establishment is or is not a factory.[1] A firm of solicitors is an establishment within the meaning of Section 1(3)(b) of the Act.[2]

For the application of the Act to any factory engaged in a Scheduled industry two conditions need to be fulfilled :

(1) a manufacturing process must be carried on in any part of the premises including the precincts of the factory, with or without the aid of power ;

(2) not less than twenty persons must be employed in any such establishment.

The word 'employment' means employment in the regular course of business of an establishment. Such employment will not include employment of a few persons for a short period on account of some pressing necessity or some temporary emergency beyond the control of establishment.[3] The Act does not cease to apply to an establishment which regularly employs for its general business the required number of persons, for a major part of the year, merely because the employment does not extend to one full year.[4]

The expression 'twenty persons' refers to the 'twenty employees' in the sense the word 'employee' is used in Section 2(f) of the Act. Employment of twenty persons in an establishment even for a single day will bring the establishment in question within the purview of the statute.[5] If on account of absence or leave of some permanent employees some more persons are appointed in an establishment, the persons actually working in the establishment would only be counted for ascertaining the number of employees in that establishment.[6]

In *M/s. Sigon Tools & Plastics Pvt. Ltd.* v. *Regional P.F. Commissioner & another*,[7] the petitioner company was incorporated on June 14, 1977 with the object of manufacturing, processing, buying, selling and dealing with plastics and plastic products but the manufacturing process started from December 26, 1980. It was held that the petitioner's establishment became a factory from Dec. 26, 1980 and the provisions of the E.P.F. Act, would apply after a lapse of five years from that date on which the manufacturing process had started. The date of commencement of liability under Section 1(3)(a) cannot be determined by reference to an isolated sale of some goods in 1978.

In *Eddy Current Controls (India) Ltd.* v. *R.P.F. Commissioner and another*,[8] the

1. *Varjivandas Hirji & Co.* v. *D.T. Ghat Pandey*, AIR 1969 Bom 5.
2. *M.G. Poddar* v. *The Regional Provident Fund Commissioner*, (1971) 1 Lab LJ 381.
3. *The P.F. Inspector, Guntur* v. *T.S. Hariharan*, AIR 1971 SC 1519.
4. *Ibid.*
5. *Ramanujam Press* v. *Regional Provident Fund Commissioner, Madras*, AIR 1970 Mad 224.
6. *G.V. Joshi* v. *State of Mysore*, AIR 1969 Mys 300.
7. (1994) 1 LLJ 88 (Bom).
8. (1994) 1 LLJ 522 (Kerala).

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petitioner is a company registered under the Companies Act, 1956 and having its registered office at Chalakudy in Kerala. It owns two factories, one at Chalakudy in Kerala and the other at Coimbatore in Tamilnadu. Both have been registered separately and are having separate licences. The Coimbatore factory has 16 employees. Both factories were engaged in manufacturing same product. The E.P.F. Act was made applicable to the factory in Kerala with effect from December 31, 1976. It was held that since both factories were owned by the petitioner, product manufactured in both the factories is the same, the registered office is the same and the balance sheet, profit and loss account, income and expenditure account are all common, there is inter transferability of funds from Coimbatore unit to Head office and *vice versa*. There has been transfer of raw materials as well and the Bank accounts of both the factories are operated by the same persons, therefore Coimbatore factory is only a branch of the establishment and not an independent unit. There is a unity of ownership, management, supervision and control and general unity of purpose and production. The mere fact that separate licences were obtained under the Factories Act for the two factories is not a relevant consideration at all.

In *Bikaner Cold Storage Co. Ltd.* v. *Regional P.F. Commissioner*,[1] the question was whether casual or temporary workmen should be included for the purpose of ascertaining the strength of workmen in terms of Section 1(3)(a) of the Act. It was held that persons employed in the normal course of business of the establishment should be considered as persons employed for the purposes of Section 1(3)(a) and persons employed for a short duration or on account of some urgent necessity or abnormal contingency, which was not a regular feature of the business of the establishment, cannot be considered as employees for the purpose of determining the employment strength in relation to the applicability of Section 1(3)(a).

In *V. Venkatesh* v. *Union of India*,[2] it was held that in view of Section 2-A of the Act, the allied branches or departments of an establishment can enjoy the benefit of this Act only so long as the establishment continues its existence but where the establishment (Factory) itself is closed or ceased to function, then the departments or branches of the establishment (Head Office) which otherwise were not covered by the provisions of Section 1(3)(a) cannot claim advantage of the Act.

In *Ess Dee Carpet Enterprises* v. *Union of India*,[3] the question was whether an establishment manufacturing carpets is subject to the E.P.F. Act, 1952. Textile Industry is included in the Schedule to the Act. It was held that the activity of weaving involves passing of the weft through the warp. While doing so even if there are knots in the yarn, still the activity is weaving. Merely because there is knotting of the yarn, the fabric which is ultimately produced does not cease to be a textile fabric. "Carpets" comes within the meaning of the expression "textiles" as explained in clause (d) to the explanation of Schedule I to the Act. The Act, therefore, applies to carpet industry.

In *D.A.V. College and another* v. *Regional Provident Fund Commissioner and others*[4] it was held that educational institutions are governed by the provisions of the Act.

In *Employees' Provident Fund Inspector, Trichur* v. *The Poly Clinic (P) Ltd.*,[5] it was held that a hospital owned by a private limited company and not providing in-patient facility is a hospital. To make an establishment of medical practitioners and specialists it is not the ownership, control or management that counts but it is the kind of business transacted that is material. If patients received treatment by qualified medical practitioners who are employed by a company managed by people not qualified

1. (1981) 1 LLJ 181.
2. (1982) 1 LLJ 162 (Bom).
3. (1990) 2 Lab LJ 27 (SC).
4. (1988) 2 Lab LJ 218 (SC).
5. (1989) 2 Lab LJ 562 (Kerala).

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in medical field, it will still be a hospital.

In *Andhra University* v. *R.P.F. Commissioner*,[1] in order to cater to the needs of students, Andhra University and Osmania University were running a printing press as part of Department of Publication and Press. The Regional Provident Fund Commissioner issued an order intimating that the Department of Publication and Press were liable for coverage under the Employees' Provident Funds Act. It was held that in order to determine the applicability of the Act, it is not necessary that the entire university must be treated as an establishment. It is incorrect to say that if the university is not a factory engaged in an industry, then a Department of the university like Publication and Printing running a Printing Press which is a factory engaged in a scheduled industry will not be treated an establishment for the application of the Act. Section 2-A does not lay down that an establishment which is a factory engaged in an industry specified in Schedule I will not be liable for coverage under the Act merely because it is part of a larger organisation, carrying on some other activities also which may not fall within the scope of the Act. On the facts of the case since the Department of Publication and Printing is engaged in printing text books, journals, registers and forms, etc., which is a manufacturing process, and printing is a scheduled industry wherein more than 20 persons are employed, it is liable for the coverage of the Act.

In *Indian Inst. of Tech.* v. *Regional P.F. Commissioner*,[2] the question was whether the mess attached to hostel run by the Indian Institution of Technology, Madras, for the benefit of students could be brought within the ambit of Section 1(3)(b) of the Act. Such running of the hostel was a statutory requirement. It was held that the mess was an integral part of the Institute and not an independent establishment within the meaning of the Act and hence it cannot be brought under the Act. Running of such a mess is only incidental to the object of imparting education and not an independent establishment.

In *Venkataramana Dispensary and Ayurvedic College* v. *Union of India*,[3] the petitioner establishment is a dispensary mainly run to impart practical training in regular allopathic medicine, where in the course of practical training, medicines are prepared under the advice and guidance of doctors teaching in the college and that such medicines are given to patients who come to the dispensary for treatment either free or on charge to those who can afford to pay for it. It was held that it is an establishment attracting the provisions of Section 1(3)(b) of the Act. The First Schedule to the Act clearly takes in the Ayurvedic medicines prepared by the establishment. The question as to whether an establishment is a charitable or a commercial institution is totally outside the purview of discussion while deciding the applicability of the Employees' Provident Funds Act.

In *Cemindia Co. Ltd.* v. *Bachubhai N. Raval*,[4] the appellant is carrying on business as engineers and engineering contracts and is engaged in building and construction industry. They were running a workshop for maintaining and repairing equipments essential for its main business. The workshop does not undertake any work other than maintaining and repairing equipment of the company. By a notification issued under Section 1(3)(b) the Act was extended to establishment of engineers and engineering contracts not exclusively engaged in building and construction industry. It was held that the workshop is not a separate establishment and it is part and parcel of the establishment of engineers and engineering contractors. Therefore the appellants are exclusively engaged in building and construction industry and as such the notification

1. (1986) 1 LLJ 155 (SC).
2. (1979) 2 LLJ 146 (Madras).
3. (1986) 2 LLJ 411 (Mad).
4. (1988) 1 Lab LJ 138 (SC).

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has no application to them.

In *Sundarsan Finance Corporation, Madras* v. *Regional Commissioner, Employees' Provident Fund, Madras and others*,[1] the Government by a notification extended the provisions of the Act to all financial establishments other than Banks engaged in activities of borrowing, lending, advancing of money and dealing with other monetary transactions with a view to earn interest. The petitioner is an establishment engaged in the conduct of chits. The chit is usually started by an individual known as the foreman. The foreman is entitled to receive the first instalment of the collections. The foreman is also entitled to a commission which shall not exceed five per cent and out of that commission he is expected to meet the expenses in connection with the conduct of the chit. It was held that chit fund business will not be covered by the notification because commission earned by foreman cannot be characterised as interest earned by establishment on monetary transaction.

In *Committee for Protection of Rights of ONGC Employees & others* v. *Oil and Natural Gas Commissioner, Dehradun & others*,[2] the question was whether the persons who were employed in temporary capacity in O.N.G. Commission when it was being run as a Department of the Government of India prior to the enactment of the O.N.G.C. Act and who were absorbed in the Commission are entitled to pension in addition to the Provident Fund benefits to which they are entitled under the E.P.F. Act. Replying the question in negative the Supreme Court observed that the statement of objects and reasons of the Act indicates that the scheme of contributory provident fund by way of retired benefits envisaged by the Act is in the nature of a substitute for old age pension because it was a fact that in the prevailing conditions in India, the institution of pension scheme could not be visualised in the near future. It was not the intention of Parliament that Provident Fund benefit under the Act would be in addition to pensionary benefits.

In *Pratap Chand Sukhoni* v. *Regional Provident Fund Commissioner*,[3] an original partnership was dissolved by a deed and its assets were divided and allotted to the partnership. Subsequently another business was commenced in the same name and at the same place as that of the original partnership. Some of the employees of the old partnership were employed in new establishment. The question is whether the two establishments are one and the same or the latter is a continuation of the earlier. In a situation like this the two establishments are neither one and the same nor the latter is a continuation of the earlier because there is no provision in the Act which lays down that an establishment covered by the Act and the scheme thereunder can never be dissolved or that the assets of such establishment, if utilised in another establishment would make the latter a part or continuation of the former.

Similarly in *N. Jogie Gounder* v. *Regional P.F. Commissioner, Madras*,[4] the petitioner was employer of an establishment, M/s. Forestdale Estate and Tea Factory. The Tea Factory was closed down for some time and was later on sold to a third person. Thus the original establishment was split in two. The provisions of the Act were applied to Tea Factory. The respondent wanted to apply the provisions of the Act to Forestdale Estate as well. The petitioner's contention was that after the split the strength of employees in Forestdale Estate fell below 20 and therefore provisions of Act/Scheme would not apply. In view of sub-section (5) of Section 1 the E.P.F. Commissioner did not agree with the contention of the petitioner. The matter thereafter was agitated before the High Court. It was held that sub-section (5) of Section 1 presupposes the continuation of the establishment as an integral whole. But when the integrity of the

1. (1990) 1 Lab LJ 598 (Mad).
2. (1991) 2 Lab LJ 271 (SC).
3. (1980) 2 LLJ 296 (Calcutta).
4. (1983) 1 Lab LJ 179 (Madras).

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establishment gets split up and if such splitting up is real and *bona fide* then the relevant question is whether the split up establishments are individually governed by the Act/Scheme. There was no rule that an establishment cannot be split up and inspite of such split up the Act/Scheme which was earlier applied to one original establishment will continue to apply to the split up entities. Therefore, the Act did not apply to the petitioner's establishment.

In *Regional Provident Fund Commissioner* v. *M/s. Ratna Enterprises*,[1] there were two cinema theatres, one called 'Rupvani' and the other 'New Chitra Talkies'. The Provident Fund Scheme was made applicable to them in 1963. In 1969 the proprietrix Smt. Ratna Bai constitute a partnership with her children and continued to manage both the theatres. In 1973 the partnership was dissolved and the assets and liabilities were divided equally among the parties. Consequently two partnerships were formed ; each getting one theatre. The applicability of the Act and the Scheme was challenged as the number of employees was now less than twenty in each of the cinema houses. It was held that the Scheme shall continue to apply to each one of them because subsequent reduction in the number of employees below twenty, for whatever reason, will not make any difference. Even if two theatres which originally constitute one and subsequently went under different owners and consequently the number of employees in each of the theatre happens to be less than 20 no exception of the Act can be made in view of Section 1(5) of the Act.

Applicability and constitutionality of sub-section (3).—The following conditions must be fulfilled in order that this Act may be applicable to any establishment :—

(1) The establishment must be engaged in an industry specified in Schedule I.
(2) At least 20 persons must have been employed in it.
(3) In case of an establishment employing fifty or more persons three years and in case of an establishment employing twenty or more but less than fifty persons five years must have elapsed from the date of its establishment.[2]

Under the Act the liability of the employer is limited to the employer of twenty or more persons. It is necessary that twenty or more persons should be shown to have been working continuously in the year.[3] So, if a factory was once employing more than fifty persons (now twenty persons), and has as a result of partition between the owners been split up into two and the owner of one of them has ceased to employ 50 (now 20) or more persons after coming into force of the Act, such a factory is not covered by the provisions of this Act.[4] The expression twenty or more persons refers to factory and not to industry. In *Madras Pencil Factory* v. *R.P.F. Commissioner*,[5] it was pointed out that Section 1(3) of the Act refers to the primary activity of the factory. It is the factory which must be engaged. In other words that must be the primary activity of the factory. If with a view to carry out its primary activity it is incidently engaged in something else, it will not alter its primary character.[6] Of course a factory may be engaged in producing more than one article. In such a case it would be perfectly correct to say that the factory is engaged in producing all those articles.

Section 1(3)(a) does not exclude composite factories from its scope. The expression "all factories engaged in any industry specified in Schedule I" does not lend itself to the construction that it is confined to factories exclusively engaged in any

1. (1986) 2 LLJ 137 (Karn).
2. *See* clause (b) to sub-section (1) of Section 16 of the Act.
3. *V.K. Bhatt* v. *A.C.B. & T. Mfg. Co.*, AIR 1974 SC 337.
4. *Golden Silk Mills* v. *Central Provident Fund Commissioner*, AIR 1958 Punj 386.
5. AIR 1959 Mad 235.
6. AIR 1959 Mad 235.

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industry specified in Schedule I. It was held by the Supreme Court in *Regional P.F. Commissioner, Bombay* v. *Shree Krishna Metal Mfg. Co. Bhandara*,[1] that the explanation to Schedule I added by Act 37 of 1953 and the insertion of the word "establishment" in Section 1(3)(a) by the Amending Act of 1956 assist the interpretation of the word "factory" as including a composite factory under Section 1(3)(a). All employees taken together employed in a factory must be twenty. The fact that a factory is engaged in industrial activities some of which fall under the schedule and some do not, will not take the factory out of the purview of clause (a).[2]

The clause "engaged in any industry specified in Sch. I" in Section 1(3)(a) should be interpreted to mean "mainly engaged in any industry specified in Schedule I". It was held in *R.P.F. Commr., Bombay* v. *Shree Krishna Metal Manufacturing Co. Bhandara*,[3] that a company carrying on four industries *viz.*, (1) Manufacturing bronze and copper sheets, (2) milling paddy, (3) a flour mill, and (4) a saw mill, within the same compound and which engaged more than 50 (now 20) persons comes within the scope of Section 1(3) of the Act. Where a factory is engaged simultaneously in different industrial activities and one of these is a scheduled industry while the others are not, then it can be said that the factory is engaged in the industry specified in Sch. I so as to come within the purview of Section 1(3)(a).[4]

In *Chhotalal Morarji* v. *Regional Provident Fund Commr.*,[5] the question for determination was whether an establishment which is engaged in more activities than one, some of which are manufacturing and some merely commercial or other activities, but employs on the whole 20 or more persons, can be brought within the scope of the Act. It was held that, "if the dominant activity is manufacturing activity, the establishment will necessarily have to be classified as a factory. If such a factory is engaged in more industries than one, some of which are enumerated in Schedule I of the Act and some not, it will have to be seen if its dominant or principal activity is an industry mentioned in the Schedule. If it is, the factory will come within the purview of clause (a) of Section 1(3) and if it is not, it will not come within the purview of the said clause. If upon applying the test, it is found that the dominant activity is a non-manufacturing activity, the establishment will go out of the purview of clause (a) of Section 1(3). In such a case if the establishment falls within the description of an establishment given in any of the notifications made by the Central Government pursuant to clause (b) of Section 1(3), the Act can validly be applied to it".

It was held in *Union of India* v. *Ogale Glass Works*,[6] that Section 1(3)(a) of the Act applies to a composite establishment like a company which has (a) glass manufacturing section, (b) lantern and safety stove section, (c) enamel section, (d) general section, and (e) a canteen section.

In *Mohammed Ali* v. *Union of India*,[7] the constitutional validity of Section 1(3)(a) was challenged on the ground that it confers uncontrolld and uncanalised power on the Government. It was further contended that the Act was intended to apply to mere wage earners and not to salaried people and that the Schedule is bad inasmuch as it is discriminatory under Article 14 of the Constitution. Rejecting these contentions their Lordships of the Supreme Court observed :—

"It cannot be asserted that power entrusted to the Central Government to

1. AIR 1962 SC 1536.
2. *Associated Industries Ltd.* v. *R.P.F. Commr.*, AIR 1964 SC 814.
3. AIR 1962 SC 1536.
4. AIR 1962 SC 1536.
5. AIR 1969 Mys 355.
6. AIR 1971 SC 2577.
7. (1965) 1 ELJ 556.

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bring within the purview of the Act such establishments or class of establishments as the Government may by notification in the official Gazette specify is uncontrolled and uncanalized. The whole Act is directed to institute Provident Funds for the benefit of employees in factories and other establishment as the preamble indicates. The institution of Provident Fund for employees is too well established to admit of any doubt of its utility as a measure of social justice. The underlying idea behind the provision of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit after receiving the circumstances of each class of establishment."

It was further observed that "the Act has given sufficient indication of the policy underlying its provisions, namely, that it shall apply to all factories engaged in any kind of industry and to all other establishments employing 20 or more persons. The Government is in a position to have all the relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishment can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. The power to exempt given to the appropriate Government under Section 17 is not uncanalised because both clauses (a) and (b) of that section postulate that the exemption would be granted on the ground that the employees of those establishments are already in the enjoyment of benefits in the nature of provident fund, pension or gratuity not less favourable to them under the Act".[1]

Effect of the number of employees falling below twenty.—Once the conditions for application of the scheme under the Act are fulfilled it applies and continues to be applicable even if the Act ceases to apply to the establishment. The ceasing of the applicability of the Act to the establishment will not automatically bring about the ceasing of the applicability of the scheme because the applicability of the scheme depends upon its own contents and not upon the provisions of the Act. Section 1(3)(b) simply confers a discretion upon the Central Government with regard to any establishment to be governed by this Act. Therefore neither the enforcement of the provisions of the scheme, nor the administration of the Fund depends upon the number of the employees and there is no justification whatever for saying that the Fund ceases to be administered or the scheme ceases to be in operation when the number falls below fifty (now twenty).[2] The admission of the employer that the required number of persons worked for at least one day in a factory will be sufficient to bring the factory within the ambit of this section.[3] Section 1(3) of the Act is applicable if the factory is temporarily closed and is restarted by lessee.[4] Section 1(3) as amended by Act of 1960 would not even after amendment, be applicable to establishments employing more than twenty but less than fifty persons from May 1960, which have completed three years and not five years.[5] In view of clear provisions under sub-section (5) of Section 1 an establishment to which this Act applies shall continue to be governed by this Act even if the number of employees falls below twenty. However, the position was different till 1971 when proviso to sub-section (5) of Section 1 has been omitted. In view of that proviso if the number of persons employed has been below 15 for a continuous period of not less than one year then the employer could cease to apply the provisions of the Act and the Scheme. *Regional Provident Fund Commissioner* v. *Amarnath*,[6] decided by Delhi High Court, wherein it has been held that if number of employees continues to

1. *Mohd. Ali* v. *Union of India*, (1963) 1 Lab LJ 536.
2. *Ramesh Metal Works* v. *State*, AIR 1962 All 227.
3. *East India Industries (Madras) Private Ltd.* v. *Regional P.F. Commissioner*, (1964) 1 LLJ 706.
4. *Loon Karan* v. *Addl. Collector, Agra*, AIR 1965 All 373.
5. *Provident Fund Inspector, Quilon* v. *Kerala Janatha Printers and Publishers (P) Ltd.*, *Trivandrum*, AIR 1965 Ker 30.
6. (1984) 1 LLJ 146 (Delhi).

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be below 15 for not less than a year the employer can opt out of the Act and Scheme and no permission was required from Regional Provident Fund Commissioner, has no relevance now after the Amending Act of 1971 whereby the proviso to sub-section (5) of Section 1 has been omitted.

Definitions

Section 2(a). Appropriate Government.—According to Section 2(a) the appropriate Government is the Central Government (1) in relation to an establishment belonging to or under the control of Central Government ; or (2) in relation to any establishment connected with (i) a railway company ; (ii) a major port ; (iii) a mine ; (iv) an oilfield ; or (v) a controlled industry ; or (3) in relation to an establishment having departments or branches in more than one State.

In relation to any establishment other than those mentioned above, the appropriate Government means the State Government.

Section 2(aa). Authorised Officer.—Authorised officer means the Central Provident Fund Commissioner, Additional Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette.

Section 2(b). Basic Wages.—The definition of 'Basic Wages' as given in Section 2(b) of the Act is both inclusive and exclusive. In the former part it says what is included in the basic wages and in the latter part it says what is not basic wages. It includes all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him. The following are not included in the basic wages :

(1) cash value of any food concession,
(2) any dearness allowance,
(3) house rent allowance,
(4) overtime allowance,
(5) bonus,
(6) commission or any other similar allowance, payable to the employee in respect of his employment or of work done in such employment, and
(7) any presents made by the employer.

Dearness allowance for the purposes of this section means all such amount paid to an employee on account of a rise in the cost of living.

In *Regional Commr, E.P.F., Tamil Nadu* v. *Management of Southern Alloy Foundries, (P) Ltd.*,[1] special allowance was paid to the employees as a result of an agreement and they had not agreed to treat it as part of basic wages or dearness allowance. Therefore, it was held that the special allowance thus paid was not basic wages and it could not be included for computation of contribution by the employer.

In *M/s. Bridge & Roofs Co.* v. *Union of India*[2] the decision of the Central Government under Section 19-A of the Act to include 'production bonus' in the definition of 'basic wages' was held to be incorrect on the following grounds :

> "Clause (ii) of Section 2(b) excludes amongst other allowances, bonus payable to the employee in respect of his employment or of work done in such employment, from the definition of "basic wages". This exception suggests that even though the main part of the definition includes all employment, certain

1. (1982) 1 LLJ 21 (Mad).
2. AIR 1963 SC 1474.

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payments which are in fact the price of labour and are earned in accordance with the terms of the contract of employment, are excluded from the main part of the definition of 'basic wages'. The word bonus has been used in this clause without any qualification. Therefore, it would not be improper to infer that when the word "bonus" was used without any qualification in the clause, the legislature had in mind every kind of bonus that may be payable to an employee. The legislature could not have been unaware that different kinds of bonus were being paid by different concerns in different industries when it passed the Act in 1952. Where the word 'bonus' is used without any qualification it does not only mean profit bonus. On the other hand, the use of the word 'bonus' without any qualifying word before it or without any limitation as to year after it, must refer to bonus of all kinds to industrial law and industrial adjudication before 1952 including the 'production bonus'. The production bonus is outside the definition of 'basic wages' in Section 2(b)."[1]

In *Jay Engg. Works* v. *Union of India*,[2] the peculiar feature of the production bonus scheme in force in Jay Engineering Works was that it had two bases, namely, (i) the quota, and (ii) the norm ; the quota being much lower than the norm and in view of the agreement between the parties the workmen were expected to give the 'norm' as the minimum production and if there was any deliberate deviation therefrom they were liable to be charged with misconduct in the shape of go slow and be dismissed for such misconduct. The minimum wages and the dearness allowance fixed by the major engineering awards were payable for production upto the quota and thereafter extra payments were made on piece rates basis upto the norm and even beyond it where the workmen produced beyond the norm. It was contended by the workers that in a scheme of the kind prevalent in the company production bonus as understood in industry only strated after the norm and that payment for production between the quota and the norm was nothing more than basic wages defined in the Act. It was held that :

"In a typical production bonus scheme the worker is not bound to produce more than the base or standard, though he may do so in order that his earnings may go up. In the scheme in force in the employer company however, the worker could not stop at the quota, he must produce upto the norm on pain of being charged with misconuct in the shape of go slow and being liable to be dismissed. Therefore, the real base of standard which is the core of a typical production bonus scheme was in the case of the company, the norm and any payment for production above the norm would be real production bonus under the scheme. The production upto the norm being the standard which was expected of a workman in the company, payment upto that production must be basic wages as defined in the Act."

The following points were further made clear in this case :

(1) The mere fact that part of the basic wages as defined in the Act was paid in one form as a time wage and part in another form as a piece rate wage, would make no difference to the whole being basic wages within the meaning of the Act.

(2) The payment for work done between the quota and the norm could not be treated as 'any other similar allowance' within Section 2(b)(ii) as the allowance mentioned in the clause were dearness allowance, house rent allowance, overtime allowance, bonus and commission, and any "other similar allowance" must be of the same kind.

1. *Messrs Bridge & Roofs Co. v. Union of India*, AIR 1963 SC 1474.
2. AIR 1963 SC 1480.

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(3) The portion of the payment which was made by the company for production above the "norm" would be production bonus and would be excluded from the term "basic wages" as defined in Section 2(b).

The expression "emoluments" which are earned by an employee while on duty" represents the amount actually earned by an employee during the period of his employment while he is actually on duty. The payment made in lieu of notice for termination of service cannot in any sense be regarded as representing emoluments earned "while on duty" and are not and do not constitute "basic wages" within the meaning of the definition given in the Act, and no percentage thereof is payable by way of provident fund contribution.[1]

In order to constitute wages emoluments must be earned by an employee. If it is a payment made to any one who was not on duty and not paid to some who were on duty, it cannot be regarded as "basic wages". Basic wages are those which are paid to all the employees of a concern and are generally paid to employees at all concerns.[2]

It was held in *Hindustan Lever Employees Union* v. *R.P.F. Commissioner & Another*,[3] that encashment of leave would be covered by basic wages for calculating contribution towards Provident Fund. If an employee who has earned leave goes on leave, his salary or wages shall obviously fall within the term, "basic wages". Therefore there is no reason to hold that in the event of his not availing the leave but encashing it, the amount which he gets in such encashment should be excluded from basic wages.

In *Prantiya Vidhyut Mandal Mazdoor Federation etc.* v. *Rajasthan State Electricity Board & others*,[4] the pay scales of workmen were revised with retrospective effect by award of arbitrators. It was held that arrears earned by employees under award are emoluments earned by workman while on duty and revision of wage structure under award is part of contract of employment. Therefore contribution is payable on arrears of pay earned under awards of arbitrator because basic wages being payable under Section 6 of the Act means the basic wages at the relevant time. In this case revised wages would be basic wages.

The *ad hoc* payment would be in the nature of present made by the employer. The *ad hoc* payment is not an allowance of any kind and as such the *ad hoc* payment cannot be regarded as basic wages.[5]

In *Amal Kumar Ghatak* v. *Regional Provident Fund Commissioner*,[6] the question was that in tea gardens pluckers who pluck more than the normal fixed and who are paid extra leaf price for that, whether such price paid has to be included in the computation of provident fund contribution. It was held that the employer has to pay contribution for such payment also because it was not in the nature of overtime as it was payment for work done during the normal working hours and not beyond that.

Section 2(c). Contribution.—'Contribution' means a contribution, payable in respect of a member under a Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies.

Section 2(d). Controlled Industry.—'Controlled industry', means any industry whose control by the Union of India has been declared by an Act of Parliament to be expedient in the public interest. All the industries specified in the First Schedule of Industries (Development and Regulation) Act have been taken under the control of the

1. *India United Mills* v. *R.P.F. Commissioner*. AIR 1960 Bom 203.
2. *Burmah Shell Oil Storage & Distributing Co. Ltd.* v. *R.P.F. Commissioner*, (1981) 2 LLJ 86.
3. (1995) 2 LLJ 279 (Bom).
4. (1993) 1 LLJ 222 (SC).
5. *Burmah Shell Oil Storage & Distributing Co. Ltd.* v. *R.P.F. Commissioner*, (1981) 2 LLJ 86 ; *E.I.D. Parry (India) Ltd.* v. *R.C.E.P.F., Tamil Nadu and others*, (1984) 1 LLJ 300 (Mad).
6. (1980) 2 LLJ 308 (Calcutta).

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Union in the public interest.

Section 2(e). Employer.—'Employer' in relation to an establishment which is a factory means—

(i) the owner or occupier of the factory ;
(ii) the agent of such owner or occupier ;
(iii) the legal representative of a deceased owner or occupier of the factory ; or
(iv) any person named as a manager of the factory under Section 7(1)(f) of the Factories Act, 1948.

In relation to any other establishment, 'employer' means—

(i) the person who has the ultimate control over the affairs of the establishment ; or
(ii) the authority which has the ultimate control over the affairs of the establishment ; or
(iii) where the affairs of an establishment are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

A receiver appointed under Order 40, Rule 1, C.P.C. to take possession of all the properties of the partnership is an employer within the meaning of this sub-section, where the receiver so appointed had all the powers except that in certain things he was required to take permission from the Court.[1] He had also power to employ additional staff with the permission of the Court. When such a receiver was prosecuted for breach of the provisions of the P.F. Scheme he pleaded that he was not 'employer' within the meaning of Section 2(e) of the Act. Rejecting this contention the Court held that he was an employer because he had possession of all the properties, movable and immovable and account books and exercised control not only over the existing staff but could also employ additional staff with the permission of the Court.[2]

In *Shri Mahila Griha Udyog Lijjat Pappad, Jabalpur* v. *Union of India and another*,[3] the petitioner is a society registered under the Societies Registration Act, 1860 and the Bombay Public Trusts Act with its head office at Bombay and a branch at Jabalpur. Some lady members of the society were working and were paid remuneration based on quantity product. The control of the society was vested in the Managing Committee. As regard the Jabalpur branch its members do not enjoy even the privileges of the members of the society. It was held that the members of the society are not employers. The employees get their wages from the managing committee who would be the employer and the members working for wages in the establishment and manufacturing *pappads* are employees.

Section 2(f). Employee.—Before a person can be said to be an 'employee' there must be proof—

(1) that he is employed,
(2) that he is employed for wages,
(3) that he is employed in work, manual or otherwise,
(4) that the work is in connection with the work of a factory (establishment), and
(5) that he gets his wages directly or indirectly from the employer.

Employee includes any person—

(i) employed by or through a contractor in or in connection with the work of the establishment ;

1. *Provident Fund Inspector, Muvattupuzha* v. *Venkatachalam Chettiar*, (1970) 1 LLJ 455.
2. *Provident Fund Inspector* v. *Venkatachalam Chettiar*, (1970) 1 LLJ 455.
3. (1994) 2 LLJ 610 (MP).

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(ii) engaged as an apprentice not being an apprentice engaged under the Apprentices Act, 1961, or under the standing order of the establishment.

Persons employed by or through a contractor in or in connection with the work of the establishment shall be included as employee provided that they have completed the period of working days laid down in the scheme for entitling an employee to the benefits of the fund.[1]

For a person to be an employee it is not necessary that he should actually be employed in the establishment itself, it is sufficient if he is employed in connection with any work of the establishment. Further, it is also not necessary that a person should be employed for any manual work ; the expression 'employee' includes a person employed for clerical or other work in or in connection with the work of the establishment.

In *Mohammed Ali* v. *Union of India*,[2] it was argued that the Act was intended by Parliament to apply to employees who were mere wage earners and not to the salaried servants. The contention was rejected by the Supreme Court on the following grounds :

> "It is a little difficult to appreciate the distinction sought to be made. Both salary and wages are emoluments paid to an employee by way of recompense for his labour. The Act itself has not made any distinction between, 'wages' and 'salary'. Both may be paid weekly, fortnightly or monthly, though remuneration for the day's work is not ordinarily termed 'salary'. Simply because wages for the month run into hundreds, as they very often do now, it would not mean that the employee is not earning wages properly so called. A clerk in an office may earn much less than the monthly wages of a skilled labourer. Ordinarily he is said to earn his salary. But in principle there is no difference between the two. It is, therefore, not established that the Act was not intended to apply to salaried employees, if by salary is meant fortnightly or monthly wages running into hundreds per month."

The Board of Trustees of the Employees' Provident Funds has decided that the working partners or managing partners even though drawing allowances, cannot be considered to be 'employees' within the meaning of the clause.

In *Shree Kutchi Visha Oshwal Mahila Mandal* v. *Union of India & others*,[3] the petitioner is a Public Charitable trust founded for the upliftment of women. It was held that the individual women who come to the premises of the establishment to manufacture eatables out of the raw materials supplied to them by the trust are workers of the trust even though they are paid on a piece-rate basis. The device of obliging the women to make an application to become associate members before they are allowed to work cannot change their legal status as employees. Therefore the authorities were justified in covering the establishment under the provisions of the Act.

In *M/s. Satish Plastics* v. *R.P.F. Commissioner*,[4] one Mr. Natverlal was entrusted with the work of writing accounts on a contract basis. He had the option to take employment with some other employer as well and had the option to work at his own residence. He was being paid Rs. 60 per month in connection with the work entrusted to him on contract basis. Natverlal was held to be an employee within the meaning of Section 2(f) of the Act.

Section 2(f) makes it clear that even if a person has been employed through a contractor in or in connection with the work of the establishment, he would yet fall within the description of "employee". Where a person is allowed to work (1) at his own

1. *Kumar Brothers (Bidi) Private Ltd.* v. *Regional Provident Fund Commissioner*, 1968 Lab IC 1578 Pat.
2. (1963) 2 LLJ 536.
3. (1993) 1 LLJ 77 (Bom).
4. (1981) 2 LLJ 277.

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places and/or (2) at the hours of his choice and/or (3) for some one else the master-servant relationship may still exist.[1]

A cashier employed during duty time by a chemist is no less an employee of the master merely because after his duty is over he works at another chemist's shop as cashier at night. Thus, a master-servant relationship exists and parties cannot make it a different relationship by applying the label of contract. An employee called by any name remains an employee for the judicial relationship does not depend on the nomenclature devised in order to defeat the law.[2]

In *Ambalavana Chettiar and Company* v. *Regional Provident Fund Commissioner, Madras*,[3] the question for consideration was whether the factory situate at Aminjikarai and the office at Mint Street constitute one 'house of business' so as to form single establishment for the purposes of the Act. In such a case it is necessary to find out which of the workers in the office fall within the definition of 'employee' in Section 2(f) of the Act. It was held that, "an establishment which involves the running of a factory may also require a staff for procuring raw materials and disposing of the manufactured products and also for the maintenance of accounts. There can be integral relation between all those items of work and it may not be proper to separate the process of manufacture in the factory from the office establishment which attends to work connected with the factory and its raw materials or products and its account. Establishment for this purpose must be viewed in a larger sense than the process of manufacture."

Although persons employed by or through a contractor are employees under the Act but there is no specific provision in the Act holding the employer responsible for complying with the provisions of the Act in relation to employees of a contractor. The provisions framed in this regard of the Employee's Provident Fund Scheme, 1952 enacted under the present Act were held by Supreme Court to be unconstitutional for the reasons stated below[4] :

(1) that there is no provision enabling the employer to recover the amount of contributions from the employees employed by or through the contractors ; and

(2) that there is obligation on the contractor to pay to the employer the amounts paid by the employer on account of the employee of the contractor. The Act has, therefore, been amended in 1963 to extend the benefit to the employees employed by or through a contractor as well as to enable the employer to recover the contribitions from the contractor.

In *P.M. Patel* v. *Union of India and others*,[5] the question arose for consideration whether the workers employed at their homes in the manufacture of beedis are entitled to the benefit of this Act and the Scheme made thereunder. The petitioners in this case are engaged in the manufacture and sale of beedis. The labour employed for the purpose consists of different categories. At the factory, which constitutes formal establishment, there are administrative and clerical staff, accountants, packers, checkers and bhattimen etc. The work of rolling beedis itself is done by three categories of workers. One category consists of workers who get the raw material directly from the manufacture and deliver the rolled beedis and received payments directly. The second category of workers consists of those who are employed by the contractors for the manufacturer.

1. *M/s. Satish Plastics* v. *R.P.F. Commissioner*, (1981) 2 LLJ 277.
2. *M/s. Satish Plastics* v. *R.P.F. Commissioner*, (1981) 2 LLJ 277.
3. (1969) 2 MLJ 160.
4. *M/s. Orissa Cement Ltd.* v. *Union of India*, AIR 1962 SC 1402.
5. (1986) 1 LLJ 88 (SC) ; *See* also *M/s. S.K. Nasiruddin Beedi Merchant Pvt. Ltd.* v. *R.P.F. Commissioner*, (1991) 1 LLJ 19 (Patna).

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The first two categories of workers collect the raw materials every day within the specified hours from the manufacturer and take it to their homes. The second category of workers are paid through contractors although they deliver the rolled beedis at the factory. The third category of home workers are those who are employed by independent contractors who have entered into a contract with the manufacturer. These independent contractors treat such home workers as their own employees and get the work done either at their own premises or at the home of the workers. In this case raw materials is collected by contractors and the product is also delivered by them to the manufacturer. The payment of wages to home workers is a matter between the contractors and the home workers. The Central Government issued a notification dated 17th May, 1977 adding beedi industry to Schedule of the Act and also bringing beedi industry within the province of the Scheme. The notification was challenged on the ground that it placed unreasonable restriction, on the fundamental right to carry on trade or business, that the home workers are not employees and also that the Act and the Scheme cannot be applied to home workers inasmuch as no age of the superannuation is prescribed in case of home workers. It was held that the terms of definition of employee under Section 2(f) are wide enough to include persons employed directly by the employer and also through a contractor and they also include persons employed in the factory and persons employed in connection with the work of the factory. A home worker who rolls beedis at his home is involved in an activity connected with the work of the factory and the expression 'in connection with' in the definition of employee is not confined to work performed in factory alone. The fact that the home workers deliver beedis to the manufacturer who has a right of rejecting those that do not conform to the standards clearly shows the degree of control and supervision for establishing the relationship of master and servant between the home workers and manufacturers. Work of rolling beedis is not of a sophisticated nature requiring control and supervision at the time when the work is done. Therefore, the right of rejection of beedis constitutes in itself an effective degree of supervision and control. The fact that there is no element of personal service in beedi rolling and that the work may be done by any member of his family is of little significance, when the test of control and supervision lies in the right of rejection. Hence home workers are employees.

In *M/s. S.P. Abdul Rahim and Son* v. *Regional Provident Fund Commissioner*[1] the Ring Labellers who paste ring labels to *beedi* at their home were held to be employee under Section 2(f) of the Act because the manufacturer for whom they were working had the right to reject the work done by *beedi* workers if it did not conform to standard. Thus he exercised supervision and control over them and as such there existed master-servant relationship between them.

Apprentices.—In *The Poly Clinic, Nagercoil* v. *Regional Commr. E.P.F. Tamil Nadu*,[2] it was held that apprentices are not employees.

Section 2(ff). Exempted employee.—'Exempted employee' means an employee to whom a Scheme or the Insurance Scheme, as the case may be, would but for the exemption granted under Section 17, have applied. In other words, it means an employee who is exempted under Section 17 of the Act. In the absence of such exemption, a Scheme of provident fund under the Act would have been applicable to him.

Section 2(fff). Exempted establishment.—'Exempted establishment', means any establishment exempted under Section 17 of the Act from the operation of all or any of the provisions of any Scheme or the Insurance Scheme, as the case may be, whether such exemption has been granted to the establishment as such or to any person

1. (1996) 1 LLJ 1134 (Mad).
2. (1983) 1 LLJ 449 (Mad).

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or class of persons employed in that establishment.

Section 2(g). Factory.—The term 'factory' is defined in Section (2)(g) of the Act. Factory means any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily carried on, whether with the aid of power or without the aid of power. Factory means premises where anything is done towards the making or finishing of an article upto the stage when it is ready to be sold or is in a suitable condition to be put in the market.[1]

It was held in *State* v. *Jograj*,[2] that a company engaged in manufacturing grinding wheels and transporting them for sale is a factory within the meaning of Section 2(g) of the Act, because when grinding wheels are being prepared and transported for sale it would be a manufacturing process.

In *Leos Mercantile Corporation, Madras* v. *Ministry of Labour Government of India, New Delhi and another*,[3] the company having its factory at Guindy has got its administrative offices at Madras and Bombay. The question was whether the factory at Guindy and its offices at Madras and Bombay could be treated as one unit for the applicability of the Act and the Scheme. It was held that a factory would also fall within the general category of establishment and to such an establishment Section 2-A of the Act would be attracted. An establishment may involve running of a factory as well as the administrative offices whether at one place or at different places and the employment strength of all the units if they constitute one integrated whole must be aggregated to find out whether the Act is applicable or not. If a factory has administrative offices or branches which go for the working and running of the factory they cannot be dissociated from the factory as such and they have to be viewed as a single unit.

The Delhi Cloth and General Mills is a registered company owning a number of factories including textile mills, sugar factories, distillery and confectionery. The petitioner's case is that three works are situate in premises of their own and they constitute different factories. The respondents asserts that they are situate within the same premises, are bounded by a common boundary wall and constitute one composite factory. It was held that :—

> "If the three constitute one factory the provisions of the Act and also the Scheme shall apply to the employees of all the three : that is, of the sugar factory, distillery and confectionery. But if the sugar factory constitutes a distinct factory, and the others are in the eye of law factories by themselves, the Act and the Scheme shall not automatically apply to those two factories, unless they are covered or were later on included in Schedule I of the Act. In other words, the point for consideration is the unit of factory for the purposes of the Act and the Scheme. Applying various tests for determination of the above question, the manufacture of sugar, confectionery and distillery located within one common compound wall were held to be one factory for the purposes of the Act."[4]

Associated Industries (P.) Ltd. v. *R.P.F. Commr.*[5] is the leading case in which principles for application of Section 1(3)(a) to composite factories were laid down. A company was running two separate and distinct industries—one engineering works and the other a tile factory in the same premises. In the tile factory 53 workmen were employed and in the engineering works 24 persons were employed. The engineering work was covered by Schedule I of the Act and therefore, contributions under Section 6 of the Act were demanded from the company. The validity of the demand by the R.P.F.

1. *Pragnarain* v. *Crown*, AIR 1928 Lah 78.
2. AIR 1961 All 556.
3. (1987) 2 LLJ 35 (Mad).
4. *Delhi Cloth & General Mills* v. *R.P.F. Commissioner*, AIR 1961 All 309.
5. AIR 1964 SC 314.

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Commissioner was challenged on the ground that the Act did not apply to company's factory. It was held that :

> "The word 'factory' used in Section 1(3)(a) has a comprehensive meaning and it includes premises in which any manufacturing process is being carried on as described in the definition and so the factory engaged in any industry specified in Schedule I does not necessarily mean a factory exclusively engaged in the particular industry specified in the said Schedule. Composite factories come within the purview of Section 1(3)(a) and the fact that a factory is engaged in industrial activities independent of each other some of which fall under the Schedule and some do not, will not take the factory out of the purview of Section 1(3)(a)."

It was further observed that the test of numerical strength applied not to the industry but to the factory. The following principles were laid down to determine the nature of the factory :[1]

(i) If the factory carries on one industry which falls under Schedule I to the Act and satisfies the requirements as to the number of employees prescribed by the relevant section, it falls under Section 1(3)(a).

(ii) If the factory carries on more than one industry all of which fall under Schedule I and its numerical strength satisfies the test, it is an establishment under Section 1(3)(a).

(iii) If a factory runs more industries than one, one of which is primary and the dominant industry and others are its feeders and can be regarded as subsidiary, minor or incidental industry, in that sense, then the character of dominant and primary industry will determine the question as to whether the factory is an establishment under Section 1(3)(a) or not. If the dominant and primary industry falls under Schedule I, the fact that the subsidiary industries do not fall under Schedule I will not help to exclude the application of Section 1(3)(a). If the dominant and primary industry does not fall under Schedule I, but one or more subsidiary, incidental, minor and feeding industries fall under Schedule I then Section 1(3)(a) will not apply.

(iv) If the factory runs more industries than one, all of which are independent of each other and constitute separate and distinct industries, Section 1(3)(a) will apply to the factory even if one or more but not all of the industries run by the factory fall under Schedule I.

Union of India v. *Ogale Glass Works*,[2] is another important decision of the Supreme Court, wherein the respondent company engaged in manufacturing glasswares, stoves, lanterns and enamelwares was held to be a composite factory and the Act applies to a composite factory.

The definition of the word "factory" given in Section 2(g) does not contain any words of limitation bringing under it only those premises including the precincts thereof where a manufacturing process in one industry only is being carried on or is ordinarily so carried on. The main object of a factory is manufacture and the question whether a particular place is or is not a factory depends on whether a manufacturing process is being carried on therein, no matter whether in one industry or in several industries.[3]

In *Metro Motors (Private) Ltd.* v. *R.P.F. Commr.*[4] The Metro Motors Private Ltd. had a shop for the sale of motor cars and attached to that shop was a service station where motor cars were serviced and repaired. About half a mile away from these

1. *Associated Industries (P) Ltd.* v. *R.P.F. Commissioner*, AIR 1964 SC 314.
2. (1971) 2 LLJ 513 : AIR 1971 SC 2577.
3. *R.P.F. Commr.* v. *Singhai Manji Lal & Sons*, (1961) 1 LLJ 275.
4. AIR 1959 Punj 89.

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premises was a workshop owned by the company and in that workshop bodies for trucks and buses were made by carpenters and persons employed by the company. It was held that :

(1) The making of bodies for trucks and buses with the help of carpenters is a manufacturing process for the carpenters and other workmen employed would quite clearly be making bodies from out of appropriate material.

(2) The shop and the service station half a mile away could not be deemed to be in that precincts of the premises in which the manufacturing of bodies for trucks and buses was carried on when there was no connection between the two premises except that of ownership.

(3) The only factory in existence was the premises where bodies for trucks and buses were made and since it was clear that in that factory and on those premises fifty or more persons (the number of employees then was fifty instead of twenty), had never been employed the Act could have no application.

In *Victoria Jubilee Technical Institute* v. *K.S. Naik, R.P.F. Commissioner, Maharashtra and others*,[1] the Victoria Institute trained students in electrical, mechanical and general engineering in laboratories and workshops attached to the Institute. The question was whether workshops and laboratories attached to the Institute will make it a factory.

It was held that the petitioner Institute cannot be described as engaged in production of electrical, mechanical and general engineering goods. The Institute has several laboratories and workshops attached to its departments for the purpose of training students and to give practical experience in their field of study.

In laboratories and workshops students are given training under the guidance of the teaching staff. The product manufactured by the students are not sold, nor the Institute derives any monetary benefit out of such production. Therefore, the Institute is not engaged in the production of such goods. The expression "engaged" indicates the commercial production or production as a primary concerned and by no stretch of imagination can educational institution be treated as engaged in production of these goods and hence it is not a factory.

Section 2(h). Fund.—'Fund' means the provident fund established under the Employee's Provident Fund Scheme framed under Section 5 of this Act providing for all or any matters specified in Schedule II.

In *Som Prakash Rekhi* v. *Union of India*[2] the Supreme Court pointed out that the roots of gratuity and Provident fund are different from pension. Each one is a salutary benefaction statutorily guaranteed independent of the other. Pensions are paid out of regard for past meritorious service.

In *Khatheeja Bai* v. *The Superintending Engineering and others*,[3] Tamil Nadu Electricity Board Contributory Provident Fund Regulations made by the Tamil Nadu Electricity Board provided for special contribution by the Electricity Board, in addition to member's contribution and Board's contribution, if the Board is satisfied that the service of a member has been good, efficient and faithful and the member has not been dismissed or removed from service. A Line Inspector employed by the Board retired after putting in about 24 years of service and died. His widow claimed the fund standing to the credit of the deceased. The Board agreed to pay the entire amount except the special contribution credited to the Provident Fund. According to the Board, special contribution is not payable whenever gratuity is paid under the Payment of Gratuity Act

1. (1980) 1 Lab LJ 254 (Bom).
2. (1981) 1 LLJ 79.
3. (1986) 1 LLJ 314 (SC).

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because special contribution is the same as gratuity. It was held that special contribution is not gratuity. It cannot be denied to employees on the ground that it has some of the known characteristics of gratuity and payment of special contribution cannot be denied on the ground that the Board is paying gratuity. If the special contribution has some common features with gratuity, it has also some distinctive features which distinguished it from the gratuity payable under the Payment of Gratuity Act, 1972.

Section 2(i). Industry.—'Industry' means any industry specified in Schedule I which means any industry engaged in the production of cement, cigarette, electrical, mechanical or general engineering products, iron (or steel), paper or textile, made wholly or in part of cotton, wool, jute or silk, whether natural or artificial. It also includes any other industry added to the said Schedule by the Central Government by notification under Section 4 of the Act.

Section 2(i-a). Insurance Fund.—"Insurance Fund" means the Deposit-linked Insurance Fund established under sub-section (2) of Section 6-C.

Section 2(i-b). Insurance Scheme.—"Insurance Scheme" means the Employees' Deposit-linked Insurance Scheme framed under sub-section (1) of Section 6-C.

Section 2(i-c). Manufacture.—The expression "manufacture" and "manufacturing process" convey identical meanings. According to Section 2(i-a) it means any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating, or adapting any article or substance with a view to its use, sale, transport, delivery or disposal. The words "manufacturing process" do not necessarily refer to something produced, but to the particular business carried on.[1] In *Owner* v. *Cottingham Sanctuary Co. Ltd.*,[2] where a laundry was being carried on for the purpose of gain and in which mechanical power was used for driving machines used in aid of the work of washing clothes, it was held to be a factory.

In *V.H. Kotecha* v. *Regional Inspector of Factories*,[3] the appellant carried on the business of collecting ghee brought by various intermediaries from several places. It was poured into a big pan and heated with the help of firewood with a view to make it uniform. The ghee from the melting pot was sampled and analysed chemically. It was then poured into the tins and sealed. These sealed tins were sent to the Head Office at Calcutta. It was held that :—

> "The process involved not only packing but also treating or adapting any article or substance with a veiw to its transport and sale and clearly came within the definition of manufacturing process. Even if that very ghee which was brought from districts were to be poured into tins and packed with a view to sending them to Calcutta though that would not involve any process of transformation that by itself would be sufficient to bring it within the definition of manufacturing process."

Section 2(j). Member.—"Member" for the purposes of this Act means a Member of the provident fund established under the Employees' Provident Fund Scheme framed under Section 5 of the Act.

Section 2(k). Occupier of a factory.—"Occupier" means the person who has the ultimate control over the affairs of the factory. It also means the managing agent where the affairs of a factory are entrusted to him. The word 'occupier' denotes a person who is either a proprietor or otherwise entitled to be in possession of the factory and controls its working whether he occupies the building or not even if he carries on the work through an agent, he is an occupier. He cannot, therefore, be anyone who is a mere servant

1. *Owner* v. *Cottingham Sanctuary Co. Ltd.*, (1910) 74 JP 219.
2. *Ibid.*
3. AIR 1960 Andh Pra 147.

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charged with specific duties in regard to the control of the machinery, workmen or office.[1] The definition of 'occupier' as given in the Act is not exhaustive and does not limit the normal meaning of the word 'occupier' as indicating a person who has actual possession and control of a factory.[2] An 'occupier' is the controller for the time being of a factory and may be either an owner or a lessee or a mortgagee with possession.[3] Whether a person is occupier or not depends upon the following considerations :

(1) Whether such a person has the right of using the factory for the purposes for which it is constructed and worked.[4]
(2) Whether he has the right of regulating and controlling it.[5]
(3) Whether he has the predominant possession of and general superintendence, over it.[6]

It has been held in *State* v. *Jograj*,[7] that a person having the ultimate control over the affairs of the company as a managing director is an occupier within the meaning of Section 2(k) and is liable to conviction under Section 14(2) of the Act.

Section 2(k-A). "Pension Fund" means the Employees' Pension Fund established under sub-section (2) of Section 6-A.

Section 2(k-B). "Pension Scheme" means the Employees' Pension Scheme framed under sub-section (1) of Section 6-A.

Section 2(ka). "Prescribed" means prescribed by rules made under this Act.

Section 2(kb). "Recovery Officer" means any officer of the Central Government, State Government or the Board of Trustees constituted under Section 5-A, who may be authorised by the Central Government, by notification in the Official Gazette, to exercise the powers of a Recovery Officer under this Act.

Section 2(l). Scheme.—'Scheme' means a scheme relating to the provident fund and framed under Section 5 of this Act.

Section 2(ll). "Superannuation", in relation to an employee, who is the member of the Pension Scheme means the attainment, by the said employee, of the age of fifty-eight years.

Section 2(m). Tribunal.—'Tribunal' means the Employees' Provident Funds Appellate Tribunal constituted under Section 7-D.

Section 2-A. Establishment.—Where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment.

The test to determine whether different units may be treated as departments of one establishment is whether they are under the same employer or not.[8] But that is not all. There are other factors which are also to be taken into account.

It was held in *Ebrahim Currim & Sons* v. *Regional P.F. Commissioner and another*,[9] that in deciding whether the two units are part of the same establishment or are separate and district units, one has to see whether one unit can exist conveniently and reasonably without the other and whether in matters of finance and employment the employer has actually kept two units distinct or integrated. The mere fact of common ownership by itself is not sufficient to satisfy the test of functional integratity. Similarly mere supply of raw materials or purchase of raw materials for the factory by the

1. *Emperor* v. *Narayan Vithoba Kalar*, AIR 1933 Nag 100.
2. *Samadia* v. *Emperor*, AIR 1926 Bom 57.
3. *Niranjan* v. *Emperor*, 13 FR 1918 (Cr).
4. *Emperor* v. *Taylor*, 10 Bom LR 38.
5. *Ibid.*
6. *Emperor* v. *Taylor*, 10 Bom LR 38.
7. AIR 1961 All 516.
8. *Pearl Trading Corpn.* v. *Regional Provident Fund Commissioner*, (1996) 1 LLJ 415 Raj.
9. (1994) 1 LLJ 369 (Bom).

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petitioner or sale of goods would not satisfy the test of functional integratity. All the relevant tests must be considered before deciding the issue as to applicability of Section 2-A of the Act.

In *Evans Food Corporation* v. *Union of India & another*[1], the petitioner was a firm registered under the Indian Partnership Act and engaged in the business of manufacturing cattle feed. The Super Traders is a firm and is the sole distributor of the product of the former. The question is whether both are establishment. The two establishments belong to the same family but having separate accounts, no common employees with independent registration under different statutes. However the business is caried on at the same premises and vehicles of one establishment are used by the other but Super Traders pay for the same. It was held that the establishment are separate and distinct and the mere fact that the partners belong to the same family does not unite the two establishments.

Section 3. Application of the Act.—Ordinarily the Act applies to such establishment which is a factory engaged in any industry specified in Schedule I and wherein twenty or more persons are employed. But Section 3 of the Act empowers the Central Government to apply the provisions of the Act to any such other establishment, whose employees have a provident fund common with the employees of any other establishment, to which this Act applies. The Central Government may do so by a Gazette notification provided the provident fund is in existence in the establishment immediately before this Act applies to such establishment.

Section 4. Power to add to Schedule.—Under Section 4 the Central Government may by a Gazette notification add any other industry in Schedule I. After such addition the provisions of this Act shall apply to any establishment engaged in the industry so added by the Central Government. But any such notification issued by the Central Government shall be laid before the Parliament as soon as may be after they are issued.

It was held in *Ojas Corporation* v. *Regional Provident Fund Commr.,*[2] that clause (b) of Section 1(3) does not indicate that the application of the Act by a notification must be limited to cases which are not factories. The word 'establishment' is used not only in Section 1(3) but in some other sections also. The word 'establishment' has been used as a genus of which the factory is a species. A plain reading of clauses (a) and (b) of Section 1(3) does not indicate that they are mutually exclusive of each other. They only divide the establishment into two parts. One being factories engaged in scheduled industry and the second establishments, whether factories or non-factories in respect of which a notification has been issued by the Central Government. By such a construction Section 4 of the Act is not rendered nugatory. Under Section 4 notification could be issued only, where the entire industry is sought to be included. The effect of clause (b) of Section 1(3) is that the Act could be extended to one establishment or to a class of establishment thus permitting classification within an industry. Such notification cannot be issued under Section 4. It cannot, therefore, be said that the two provisions would necessarily overlap in each and every case.

In *P.M. Patel and Sons* v. *Union of India,*[3] raw material for rolling beedis was supplied by the manufacturer to the home workers who after rolling beedis at their home had to deliver them at the counter of the manufacturer who could reject those beedis that do not conform to the prescribed standard. No age of retirement was fixed for home workers. It was held that the provisions of the Act and the Scheme framed therein could be applied to home workers and for such application fixation of age of retirement, was

1. (1994) 2 LLJ 646 (Kerala).
2. (1970) Lab IC 81 (Guj).
3. (1986) 1 LLJ 88 (SC).

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not necessary. In the opinion of the court 'retirement' does not in the absence of anything more, imply a fixed age for leaving service. It has a wide connotation and in the absence of a prescribed age of superannuation it must take on its ordinary meaning of the normal cessation of service by an act of the employer or the worker. Further, an establishment by the terms of its definition is wide enough to include the dwelling house of a home worker. Hence, the provisions of the Act and the Scheme apply to home workers.

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CHAPTER II
EMPLOYEES' PROVIDENT FUND SCHEME AND AUTHORITIES

Section 5. Employees' Provident Fund Scheme.—Section 5 of the Act authorises the Central Government to frame Employees' Provident Fund Scheme for the establishment of Provident Fund under this Act. The Central Government shall have to issue a notification in the Official Gazette before framing any such scheme. The scheme shall apply to employees or any class of employees of an establishment or class of establishments as specified in it. The word 'specify' means that there should be no room for uncertainty in mentioning or naming the establishment to which the scheme is to be applied.[1] After the framing of the scheme as soon as possible, a Fund shall be established in accordance with the provisions of this Act and the scheme.

The fund shall vest in and be administered by the Central Board, constituted under Section 5-A. Subject to the provisions of this Act. A Provident Fund Scheme may provide for all or any of the matters specified in Schedule II. Any such scheme shall take effect either prospectively or retrospectively on such date as may be specified in the Schedule.

The power of the Central Government to frame a scheme is neither unrestricted nor unguided. There are various provisions in the Act for the guidance of the Central Government. It is an idle contention that Section 5 gives wholly unrestricted and unguided direction to the Central Government to frame a scheme, and it appears on the other hand that the Act is full of carefully laid down principles to guide the Central Government.[2]

Two distinct powers are conferred on the Central Government by Section 5(1) namely, (i) to frame a scheme, and (ii) to specify to which factories the scheme shall apply. Both these powers can be exercised through the medium of a single notification. Further the factories to which the scheme shall apply may be specified in the scheme itself.[3]

In the *District Exhibitors Assn., Muzaffarnagar & others* v. *Union of India & others*,[4] a notification, dated 30 April 1986 was issued applying Provident Funds Scheme to cinema theatres from 1-10-1984 which is the date of coming into force of the Cine-Workers and the Cinema Theatre Workers (Regulation of Employment) Act, 1981. Under Paras 30 and 32 of the Employees Provident Funds Scheme. The employer is responsible to pay both the employers' as well as employees' share of contribution and he is authorised to deduct the employees' share from the wages of the employee for the period in respect of which the contribution is payable. In view of the above provisions it was held that both the sections 5(2) and 7(1) of the E.P.F. Act confer express power of making the Employees Provident Funds Scheme applicable retrospectively. But by retrospectively applying the Scheme, the employer cannot be asked to pay the employees' contribution for the period antecedent to the notification

1. *Mahaveer Metal Manufacturing Company, Falna* v. *Regional Provident Fund Commr., Jaipur*, (1970) Lab IC 251 (Raj).
2. *R.P.F. Commr.* v. *L.R.F. Works*, AIR 1962 Punj 507.
3. *Standard Cotton and Silk Weaving Co. Ltd.* v. *Reg. P.F. Commr.*, 9 FJR 50.
4. (1991) 2 Lab LJ 115 (SC).

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applying the Scheme because he has no right to deduct the same from the future wages payable to the employee. The payment of employees' contribution by the employer with the corresponding right to deduct the same from the wages of the employees could be only for the current period during which the employer has also to pay his contribution.

Where a factory had ceased to work for some time, the workers thereof applied for refund because the amount was payable under para 72 of the scheme. But the application for withdrawal did not conform to the provisions of para 69(2) of the scheme. The workers joined the same factory, in which they had worked for more than a year, before any order for refund was made. It was held by High Court that para 69(4) of the scheme will not apply in this case. Their case was governed by para 26 and those workers cannot be said to be employed in the factory as new workers. It was wrong to say that they would not be entitled to the provident fund benefit unless they again qualified themselves by one year's service.[1]

In *Bombay Printers Ltd. & others* v. *Union of India and others*,[2] seven employees of the petitioners retired on attaining the age of superannuation and had withdrawn their full amount of accumulation of Provident Fund. They were re-employed by the petitioner on temporary basis as per their convenience and subject to their health conditions. Asstt. P.F. Commissioner, Maharashtra called upon the petitioner to remit provident fund dues in respect of these employees. It was held that the employer cannot be asked to pay contribution in respect of re-employed employees on temporary basis.

The delegation of power under Section 5 of the Employees' Provident Fund and Misc Provisions Act, 1952 on the Central Government for framing the scheme cannot be said to be *ultra-vires* the Act or Article 14 of the Constitution of India.[3]

Section 5-A. Central Board.—The Central Government may by a Gazette notification constitute Board of Trustees called Central Board for administering the Employees' Provident Fund in the territories to which this Act extends. The Central Board shall come into force from such date as may be specified in the notification, and shall consist of the following persons as members—

(a) a Chairman and a Vice-Chairman to be appointed by the Central Government ;

(aa) the Central Provident Fund Commissioner, *ex-officio* ;

(b) not more than five persons appointed by the Central Government from amongst its officials ;

(c) not more than fifteen persons representing Government of such State as the Central Government may specify in this behalf, appointed by the Central Government ;

(d) Ten persons representing employers, or the establishment to which the Scheme applies, appointed by the Central Government after consultation with such organisations of employers as may be recognised by the Central Government in this behalf ; and

(e) Ten persons representing employees, in the establishment to which the Scheme applies, appointed by the Central Government after consultation with such organisations of employees as may be recognised by the Central Government in this behalf.

The terms and conditions subject to which a member of the Central Board may be appointed shall be such as may be provided for in the Scheme. The time, place and procedure of the meetings of the Central Board shall be such as may be provided for

1. *Loon Karan Sethia Vandana* v. *Additional Collector Agra*, 1958 All WR 301 (HC).
2. (1992) 1 Gujrat LR 816 (Bom).
3. *Cotton Corporation & others* v. *Union of India & others*, (1993) 1 LLJ 1015 (Raj).

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in the Scheme. The Central Board shall subject to the provisions of Section 6-A and Section 6-C administer the Fund, vested in it in such manner as may be specified in the scheme. The Central Board shall perform such other functions as it may be required to perform by or under any provisions of the Scheme, the Family Pension Scheme and the Insurance Scheme.

Sub-section (5) provides that the Central Board shall maintain proper accounts of its income and expenditure in such form and in such manner as the Central Government may, after consultation with the Comptroller and Auditor-General of India, specify in the Scheme.

According to sub-section (6) the accounts of the Central Board shall be audited annually by the Comptroller and Auditor-General of India and any expenditure incurred by him in connection with such audit shall be payable by the Central Board to the Comptroller and Auditor-General of India.

According to sub-section (7) the Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the Central Board shall have same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General has, in connection with the audit of Government account and, in particular, shall have the right to demand the production of books, accounts, connected vouchers, documents and papers and inspect any of the offices of the Central Board.

Sub-section (8) provides that the accounts of the Central Board as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded to the Central Board which shall forward the same to the Central Government along with its comments on the report of the Comptroller and Auditor-General.

According to sub-section (9) it shall be the duty of the Central Board to submit also to the Central Government an annual report of its work and activities and the Central Government shall cause a copy of the annual report, the audited accounts together with the report of the Comptroller and Auditor-General of India and the comments of the Central Board thereon to be laid before each House of Parliament.

The Board of Trustees shall be a body corporate under the name specified in the notification constituting it, having perpetual succession and a common seal and shall by the said name sue and be sued.[1]

Section 5-AA. Executive Committee.—(1) The Central Government may, by notification in the Official Gazette, constitute, with effect from such date as may be specified therein, an Executive Committee to assist the Central Board in the performance of its functions.

(2) The Executive Committee shall consist of the following persons as members, namely :—

(a) a Chairman appointed by the Central Government from amongst the members of the Central Board ;

(b) two persons appointed by the Central Government from amongst the persons referred to in clause (b) of sub-section (1) of Section 5-A ;

(c) three persons appointed by the Central Government from amongst the persons referred to in clause (c) of sub-section (1) of Section 5-A ;

(d) three persons representing the employers elected by the Central Board from amongst the persons referred to in clause (d) of sub-section (1) of Section 5-A ;

(e) three persons representing the employees elected by the Central Board from

1. Ins. S. 5-C of the Employees' P.F. Act, 1952.

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amongst the persons referred to in clause (e) of sub-section (1) of Section 5-A ;

(f) The Central Provident Fund Commissioner, *ex officio.*

(3) The terms and conditions subject to which a member of the Central Board may be appointed or elected to the Executive Committee and the time, place and procedure of the meetings of the Executive Committee shall be such as may be provided for in the Scheme.

Section 5-B. State Board.—Section 5-B of the Act empowers the Central Government to constitute by a notification in the official Gazette a State Board of Trustees for any State after consultation with the Government of that State in such a manner as may be provided for in the Scheme. A State Board shall exercise such powers and perform such duties as the Central Government may assign to it from time to time. The terms and conditions subject to which a member of a State Board may be appointed shall be such as may be provided for in the Scheme and the Family Pension Scheme. The time, place and procedure of the meetings of a State Board shall be such as may be provided in the Scheme and the Family Pension Scheme.

Section 5-C. Board of Trustees to be a body corporate.—The Central and the State Board of Trustees shall be a body corporate under the name specified in the notification constituting it, having perpetual succession and common seal and shall by the said name sue and be sued.

Section 5-D. Appointment of officers.—The Central Government shall appoint a Central Provident Fund Commissioner who shall be the chief executive officer of the Central Board and shall be subject to the general control and superintendence of that Board. The Central Government may also appoint a Financial Adviser and Chief Accounts Officer to assist the Central Provident Fund Commissioner in the discharge of his duties.

The Central Board may appoint, subject to the maximum scale of pay as may be specified in the scheme, as many Additional Central Provident Fund Commissioners, Deputy Provident Fund Commissioners, Regional Provident Fund Commissioners, Assistant Provident Fund Commissioners and such other officers and employees as it may consider necessary for the efficient administration of the Scheme, the Family Pension Scheme, and the Insurance Scheme. Sub-section (4) provides that no appointment to the post of the Central Provindent Fund Commissioner or an Additional Central Provident Fund Commissioner or a Financial Adviser and Chief Accounts Officer or any other post under the Central Board carrying a scale of pay equivalent to the scale of pay of any Group 'A' or Group 'B' post under the Central Government shall be made except after consultation with the Union Public Service Commission. But no consultation with the Union Public Service Commission is necessary :

(a) if the appointment is for a period not exceeding one year, or

(b) if the person to be appointed is at the time of his appointment—

(i) a member of the Indian Administrative Service ; or

(ii) in the service of Central Government or a State Government or the Central Board in a Group 'A' or Group 'B' post.

A State Board may with the approval of the State Government concerned appoint such staff as it may consider necessary. The method of recruitment, salary and allowances, discipline and other conditions of service of the Central Provident Fund Commissioner and the Financial Adviser and Chief Accounts Officer shall be such as may be specified by the Central Government. Salaries and allowances of these officers shall be paid out of the Fund.

According to clause (a) of Section 5-D (7) the method of recruitment, salary and

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allowances, discipline and other conditions of service of the Additional Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner, Assistant Provident Fund Commissioner and other officers and employees of the Central Board shall be such as may be specified by the Central Board in accordance with the rules and orders applicable to the officers and employees of the Central Government drawing corresponding scales of pay :

Provided that where the Central Board is of the opinion that it is necessary to make a departure from the said rules or orders in respect of any of the matters aforesaid, it shall obtain the prior approval of the Central Government.

Clause (b) of Section 5-D(7) provides that in determining the corresponding scales of pay of officers and employees under clause (a), the Central Board shall have regard to the educational qualification, method of recruitment, duties and responsibilities of such officers and employees under the Central Government in case of any doubt, the Central Government shall refer the matter to the Central Government whose decision thereon shall be final.

According to sub-section (8) the method of recruitment, salary and allowances, discipline and other conditions of service of officers and employees of a State Board shall be such as may be specified by that Board, with the approval of State Government concerned.

Section 5-DD. Act and proceedings of the Central Board or its Executive Committee or the State Board not to be invalidated on certain grounds.—No Act done or proceeding taken by the Central Board or the Executive Committee constituted under Section 5-AA or the State Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Central Board or the Executive Committee or the State Board, as the case may be.

Section 5-E. Delegation.—The Central Board may delegate to the Executive Committee or to the Chairman of the Board or to any of its officers and State Board may delegate to its Chairman or to any of its officers, subject to such conditions and limitations, if any, as it may specify, such of its powers and functions under this Act as it may deem necessary for the efficient administration of the Scheme, the Pension Scheme and the Insurance Scheme.

Section 6. Contributions and matters which may be provided for in the scheme.—Under Section 6 the contribution paid to the Fund by the employer shall be ten per cent of the basic wages and the dearness allowance and retaining allowance and the contribution payable by the employee shall be equal to the employer's contribution. However if an employee so desires his contribution shall be an amount exceeding ten per cent of his basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under this section. Para 30 of the Employees' Provident Fund Scheme provides that the employer shall in the first instance pay both the contributions payable by himself and also on behalf of the member employed by him :

Provided that in its application to any establishment or class of establishments which the Central Government, after making such inquiry as it deems fit, may, by notification in the Official Gazette specify, this section shall be subject to the modification that for the words "ten per cent" at both the places where they occur, the words "twelve per cent" shall be substituted.

Where the amount of any contribution payable under this Act involves a fraction of a rupee the scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee. For the purposes of contribution to the

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Provident Fund under Section 6 dearness allowance shall include also the cash value of any food concession allowed to the employee. Similarly, "retaining allowance" means an allowance payable, for the time being, to an employee of any factory or other establishment during any period in which the establishment is not working, for retaining his services.

It has been provided in para 29 of the scheme that the contributions shall be calculated on the basis of the basic wages and dearness allowance including the cash value of any food concession actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.[1] Each contribution shall be calculated to the nearest quarter of a rupee, 12.5 naye Paise or more to be counted as the next higher quarter of rupee.[2]

Recovery of members' share of contribution.—The amount of a member's contribution paid by the employer shall notwithstanding the provisions in the Employee's Provident Fund Scheme or any law for the time being in force, or any contract to the contrary, be recoverable by means of deduction from any wages of the member and not otherwise. But no such deduction may be made from the wages other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable.[3] Provided also that the employer shall be entitled to recover the employees' share from a wage other than that which is paid in respect of the period for which the contribution has been paid or is payable where the employee has in writing given a false declaration at the time of joining service with the said employer that he was not already a member of the Fund.[4]

Para 30 of the Scheme enjoins the employer to pay, in the first instance, both the contributions, of himself and of the employee. The expression "in the first instance" denotes the order of recovery. It does not mean only once. The employer and the employees of a concern to which the Act applies become liable to pay contribution prescribed by Section 6(1) and the responsibility for making the payment of the contributions of the employer as well as of the employee lies on the employer.[5]

A demand made by the Regional Provident Fund Commissioner to the employer to contribute his share from a back date in respect of those employees who have completed one year's service on the date was held to be neither illegal nor offending the provisions of Article 31 of the Constitution.[6] Where an option was given by the government to the employee regarding payment of arrears of employee's share of contribution, it was held that such an order being inconsistent with the provisions of the Act, was bad under the express terms of Section 19-A of the Act.[7]

It was held in *Mafatlal Group Staff-Association and others* v. *R.P.F. Commissioner & others*,[8] that merely because the employees who are the members of the E.P.F. Scheme before March 1, 1971 were given an option to become or not to become members of the family Pension Scheme, it does not follow that the employees who become members of the E.P.F. Scheme after March 1, 1971 and who are not given such option are discriminated against. Those who come after the introduction of the scheme do become members but those who were already members of the Provident Fund are free to become member of the Pension Fund or not. Both of them represent two different categories.

1. E.P.F. Scheme Para 29(3).
2. *Ibid* Para 29(4).
3. *Ibid* Para 32(1).
4. *Ibid* (Prov.) to Para 32(1).
5. *Solanki Workshop* v. *R.P.F. Commr.*, AIR 1963 MP 7.
6. *Haji Nadir Ali Khan* v. *Union of India*, AIR 1958 Punj 177.
7. *Aluminium Corporation of India* v. *R.P.F. Commr.*, AIR 1958 Cal 570.
8. (1994) 2 LLJ 382 (SC).

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In *Mohanraj* v. *Regional Provident Fund Commissioner*[1] it was held that the Act applies to an establishment with effect from the date the notification states the Act applies and not from the date of the notification or from the date the competent authority determines the amount payable by the employer. The Act applies if the conditions stated in the Act are satisfied.

In exercise of the powers conferred by Section 5 of the Act the Central Government published an Employees' Provident Fund Scheme. Para 2(f)(iii) of the Scheme defined "excluded employee". Under the Scheme all employees other than the "excluded employees" became members of the Fund after completing one year's continuous service. Para 2(f)(iii) of the Scheme was amended in 1958, whereby all employees employed by a contractor who were directly connected with any manufacturing process carried on in a factory or establishment became entitled to the benefit provided by the Act. By another amendment in 1962 para 2(f)(iii) was repealed and a new para 73-A was added, whereby all employees whether connected or not with the manufacturing process carried on in a factory were made entitled to the benefit provided by the Act. The constitutionality of the two amendments was challenged in a writ petition under Article 32 of the Constitution. Declaring the two amendments as unconstitutional and void the Supreme Court held that :

> "The intention of the legislature as expressed in Section 6(1) of the Act is to make the employer liable only for a moiety of the Provident Fund and while the Scheme of 1952 is well designed to carry out this intention in its application to workmen directly employed, by reason of the combined operation of paras 30 to 32, it breaks down, in its extension to contract labour by reason of the inapplicability of para 32. It operates unfairly and harshly on persons who employ contract labour and those who employ direct labour. The Scheme, therefore, cannot be said to be reasonable and must be struck down as not falling within the protection afforded by Article 19(6) of the Constitution".[2]

In *Bihar S.E. Board* v. *Their Workmen*,[3] the question for consideration was whether there should be a contributory Provident Fund Scheme on the basis of basic wages or total wages. The problem arose with reference to the application of State Electricity Board Employees' Provident Fund Scheme. The Electricity Board agreed to extend this Scheme to all employees except those to whom the Employees' Provident Funds Act applies and the Government servants on deputation. The reference in appeal was whether the benefit of the Employees' Provident Fund Act, 1952 should be extended to any additional categories of workmen. The Supreme Court directed the tribunal to consider the matter afresh in the light of the following observations :—

> "The Electricity Board is not an ordinary commercial concern. It is a public service institution. It is not expected to make any profit. It is expected to extend the supply of electricity to unserved areas without reference to consideration of loss that might be incurred as result of such extension. In analysing the capacity of the Board to bear any additional burden in the matter of provident fund or other amenities, whether the same considerations that applied in case of private commercial concerns could be applied is a rather difficult question in view of the statutory obligations laid on the Board under the various sections of the Electricity Act, 1949. In fact the decision might very often depend on a close analysis of the financial condition of the Board. Further if the industry is in a stable condition and the burden of provident fund and gratuity does not result in loss to the employer, the burden will have to be borne by the employer like the burden of wage-structure in the interest of social justice."

1. (1987) 2 LLJ 177 (Kerala).
2. *M/s. Orient Cement Ltd.* v. *Union of India*, AIR 1962 SC 1402
3. AIR 1976 SC 251.

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The benefit of Provident Fund is the minimum that has been secured by this Act. Gratuity and pension is an additional form of relief for the employee to fall back upon. If the industry is a flourishing one, there is no reason why he shall not be entitled to both the retirement benefits. If after considering all relevant circumstances, the stability of the concern, the profits made by it in the past, its future prospects and its capacity we come to the conclusion that in the concern in question the labour should be provided with a gratuity scheme in addition to that of a provident fund scheme, there is no justification to disturb this conclusion.[1]

Section 6-A. Employees' Pension Scheme.—(1) The Central Government, may, by notification in the *Official Gazette*, frame a scheme to be called the Employees' Pension Scheme for the purpose of providing for—

(a) superannuation pension, retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this Act applies ; and

(b) widow or widower's pension, children pension or orphan pension payable to the beneficiaries of such employees.

(2) Notwithstanding anything contained in Section 6, there shall be established, as soon as may be after framing of the Pension Scheme, a Pension Fund into which there shall be paid from time to time, in respect of every employee who is a member of the Pension Scheme,—

(a) such sums from the employer's contribution under section 6, not exceeding eight and one-third per cent of the basic wages, dearness allowance and retaining allowance, if any, of the concerned employees, as may be specified in the Pension Scheme ;

(b) such sums, as are payable by the employer of exempted establishments under sub-section (6) of Section 17 ;

(c) the net assets of the Employees' Family Pension Fund as on the date of the establishment of the Pension Fund ;

(d) such sums as the Central Government may, after due appropriation by Parliament by law in this behalf, specify.

(3) On the establishment of the Pension Fund, the Family Pension Scheme (hereinafter referred to as the ceased scheme) shall cease to operate and all assets of the ceased scheme shall vest in and shall stand transferred to, and all liabilities under the ceased scheme shall be enforceable against, the Pension Fund and the beneficiaries under the ceased scheme shall be entitled to draw the benefits, not less than the benefits they were entitled to under the ceased scheme, from the Pension Fund.

(4) The Pension Fund shall vest in and be administered by the Central Board in such manner as may be specified in the Pension Scheme.

(5) Subject to the provisions of this Act, the Pension Scheme may provide for all or any of the matters specified in Schedule III.

(6) The Pension Scheme may provide that all or any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in that behalf in that scheme.

(7) A Pension Scheme, framed under sub-section (1), shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of session immediately following the session or the successive sessions aforsaid, both Houses agree in making any modification in the scheme or both Houses agree that the scheme should not be made, the scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything

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1. *Anti-Biotics* v. *Workmen*, AIR 1967 SC 948.

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previously done under that scheme.

In *Smt. Kamla Bai* v. *Secretary, M.P. Electricity Board & others*,[1] the deceased husband of the petitioner was an employee of the Electricity Board. Deductions were made from his wages towards contribution to Family Pension Fund since April, 1971 till his death in 1979 except for the period of August to November 1977. Under the Family Pension Scheme an employee was required to exercise his option and in the present case he had not exercised his option. In case of claim of family pension by the widow it was held that the determinants of entitlement to pension are provided in the scheme and absence of formal option as required under the pension scheme cannot defeat claimants right otherwise acquired. The acquiescence of the employee in the continued deduction towards his contribution would be deemed exercise of his option. Therefore the widow was entitled for family pension.

In *Gitaben Arvind Kumar Seth* v. *Regional Provident Fund Commissioner & others*,[2] the E.P.F. Act was made applicable to the establishment with effect from April 1, 1990. One of the employees died on July 26, 1990. The legal heirs of the deceased were given benefit under the E.P.F. Scheme but were denied benefit under Family Pension Scheme and Deposit-linked Insurance Scheme on the ground that in view of circular of the Department, the deceased employee was not entitled because his membership for Family Pension Scheme was below three months on the date of death. Family Pension Scheme was made applicable to the establishment only from May 31, 1990. It was held that the contribution to Provident Fund and Family Pension are not separate, but it is correlated and co-existing with the contribution made by the employee and employer every month under Section 6 of the Act to P.F. Scheme. Contribution is payable with effect from the date when the provisions of the Act are applicable to any establishment. Section 6-A also links Family Pension Fund for the purpose of implementing Family Pension Scheme with the contribution made to the fund. Since the deceased employee became a member of the Provident Fund from April 1, 1990 and had contributed for more than 3 months towards the Provident Fund he became a member and a contributor to the Family Pension Scheme with effect from April 1, 1990. Hence the legal heirs would be entitled to family pension.

Section 6-C. Employees' Deposit-linked Insurance Scheme.—(1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees' Deposit-linked Insurance Scheme for the purpose of providing Life Insurance benefits to the employees of any establishment or class of establishments to which this Act applies.

(2) There shall be established, as soon as may be after the framing of the Insurance Scheme, a Deposit-linked Insurance Fund into which shall be paid by the employer from time to time in respect of every such employee in relation to whom he is the employer, such amount, not being more than one per cent of the aggregate of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable in relation to such employee as the Central Government may, by notification in the Official Gazette, specify.

Explanation.—For the purposes of this sub-section, the expression "dearness allowance" and "retaining allowance" have the same meanings as in Section 6.

(3) Omitted.

(4)(a) The employer shall pay into the Insurance Fund such further sums of money, not exceeding one-fourth of the contribution which he is required to make under sub-section (2), as the Central Government may, from time to time, determine to meet all the expenses in connection with the administration of the Insurance Scheme other than expenses towards the cost of any benefits provided by or under that scheme.

(b) Omitted.

1. (1992) 1 Lab LJ 362 (MP).
2. (1995) 2 Lab LJ 978 (Guj).

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(5) The Insurance Fund shall vest in the Central Board and be administered by it in such manner as may be specified in the Insurance Scheme.

(6) The Insurance Scheme may provide for all or any of the matters specified in Schedule IV.

(7) The Insurance Scheme may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in that Scheme.

Section 6-D. Laying of Schemes before Parliament.—Every scheme framed under Section 5, Section 6-A and Section 6-C shall be laid as soon as may be after it is framed, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the scheme or both Houses agree, that the scheme should not be framed, the scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that scheme.

Section 7. Modification of scheme.—According to Section 7(1) the Central Government may, by notification in the Official Gazette, add to, amend or vary either prospectively or retrospectively, the Family Pension Scheme or the Insurance Scheme, as the case may be.

In view of sub-section (2) of Section 7 every notification issued under sub-section (1) shall be laid, as soon as may be after it is issued, before each House of Parliament while it is in session, for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification, or both Houses agree that the notification should not be issued, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification.

Section 7-A. Determination of money's due from employees.—(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, and Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order,—

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute ; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme, as the case may be,

and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

He shall then make an order determining the amount due from any employer as aforesaid. Where a demand for contribution to the Provident Fund is made but the liability is disputed by the employer, the determination of liability is a condition precedent to any order made under Section 7-A of the Act.[1] The officer conducting any inquiry for the above purpose shall have the same powers as are vested in a Court under Civil Procedure Code for trying a suit in respect of the following matters :

(a) enforcing the attendance of any person or examining him on oath ;

(b) requiring the discovery and production of documents ;

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1. *Balasore Motor Association* v. *Regional Provident Fund Commr. Orissa*, AIR 1970 Orissa 199.

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(c) receiving evidence on affidavit ;

(d) issuing commissions for the examination of witnesses.

Any such enquiry shall be deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the C.P. Code and for the purpose of Section 196 of the Indian Penal Code. No order shall be made under sub-section (1) unless the employer concerned is given a reasonable opportunity of representing his case.

(3-A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

(4) Where an order under sub-section (1) is passed against an employer *ex parte*, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry :

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.—Where an appeal has been preferred under this Act against an order passed *ex parte* and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the *ex parte* order.

(5) No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party.

The Central Government has power to extend the provisions of the Provident Fund Scheme to any industry.[1] The purpose of Section 7-A is to determine the quantum of liability. Where it is contended that the Act itself is not applicable to an establishment, there is no scope whatsoever for the determination of the quantum under Section 7-A.[2]

It was held in *R.P.F. Commissioner Tamil Nadu & Pondicheri* v. *M/s. Kamraj Textiles and others*,[3] that during the pendency of the adjudication proceedings before the Central Government under Section 19-A of the E.P.F. Act, 1952, the liability under Section 7-A of the said Act cannot be enforced and it will remain suspended till such adjudication is over.

It was held in *Damji Bhai L. Shah* v. *R.P.F. Commissioner and another*,[4] that before passing the order under Section 7-A the Commissioner has to give reasonable opportunity. Issue of show cause notice containing the conclusion without giving documents of evidence on the basis of which the conclusion is arrived would not amount to giving reasonable opportunity because it would prejudicially affect the right of the party to defend.

Section 7-A does not provide that the authority holding enquiry must act judicially. Yet as the authority has certain powers of a Civil Court and the proceedings before it

1. *Nazeena Traders (P) Ltd.* v. *Regional Provident Fund Commissioner, Hyderabad*, AIR 1965 AP 200.
2. *Valluver Handloom Textiles* v. *Govt. of India*, (1981) 1 LLJ 458.
3. (1991) 1 Lab LJ 521 (Madras).
4. (1992) 1 Lab LJ 244 (Bom).

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are judicial for certain purposes, therefore, having regard to the rights involved and likely to be affected, the Authority exercises quasi-judicial functions and his procedure must conform to the rules of natural justice. Denial to the employer of the opportunity to represent his case before final order is passed, amounts to violation of natural justice.[1] Any claim for compensation under Section 14-B of the Act will also be an amount payable under the provisions of this Act and as such the provisions of Section 7-A will apply.[2] It was held in *K.P.S. Tape Factory, Tiruchi* v. *The Regional Provident Fund Commr.*,[3] that : "where an establishment comes within the purview of the Act it is the statutory obligation of the employer to contribute to the Fund without waiting for any notice from the R.P.F. Commissioner. The fact that the employer failed in his duty to contribute and the default was discovered by the authorities later does not mean that the employer's contribution to the Fund should be waived for the pre-discovery period merely because the employee has either left the services or retired or died before discovery by the authorities of the default of the employer to contribute to the Fund" The authorities will be justified in demanding contribution in respect of those employees who have left their service and the authorities have no power to remit or waive the employees' share of contribution to the Provident Fund on the ground of hardship or oppressiveness.[4]

In *Mandovi Pellets Ltd.* v. *Regional P.F. Commissioner for Goa and another*,[5] the workers union of Mandovi Pellets Ltd. through its secretary has applied to intervene in the writ petition. The workers were heard at the time of inquiry conducted by R.P.F. Commissioner in dispute raised under Section 7-A. It was held that in adjudication dispute regarding applicability of the Act, the workers intervention is permissible especially when they have already participated in the inquiry. From the language of Section 7-A it does not follow that the workers have no right to be heard in support or opposition because their interest is vitally involved.

In *Wirenetting Stores* v. *R.P.F. Commissioner, New Delhi*,[6] it was held that apart from the question of applicability of the Act, and the Scheme, even the quantum may be determined under Section 7-A in proceedings like the one contemplated by the Act without disclosing the criteria. The least that is required when rights are likely to be affected is that this is legislative provision for some procedural safeguards. Therefore, in the absence of the provisions for appeal and a possible view that sub-section (4) of Section 7-A bars the jurisdiction of the Civil Courts, Section 7-A must be held to be violative of Article 14 of the Constitution.

The question of validity of Section 7-A of the Act was examined in *Prakash Kothari* v. *R.P.F. Commr., Maharashtra & Goa*.[7] It was held that the Act is a social legislation and Section 7-A is attracted only when the employer fails in his legal obligation to make contribution. Interest of poor employees is involved and the realisation of the amount has to be quick. Persons of high rank of a Commissioner or such other officer authorised by the Central Government under Section 14-B are alone vested with adjudicative powers. The Act not only provides for an opportunity of being heard, but in certain matters the officer is vested with the powers of a civil court. Enquiry under the provisions of Section 7-A is deemed to be a judicial inquiry within the meaning of Sections 193 and 228 and for the purposes of Section 196 of the Indian

1. *Gunvantrai* v. *Regional Provident Fund Commr.*, AIR 1970 MP 221.
2. *The Ouchterlony Valley Estates (1938) Ltd., Nilgiris* v. *The Regional Provident Fund Commr.* (1970) 1 MLJ 638.
3. (1970) 1 MLJ 497.
4. *Subbaier* v. *Regional Provident Fund Commissioner*, (1970) 1 MLJ 497.
5. (1995) 1 LLJ 254 (Bom).
6. (1982) 1 LLJ 7 (Delhi).
7. (1990) 2 Lab LJ 217 (Bom).

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Penal Code. Therefore, there is nothing arbitrary or unreasonable in the legislative policy of the order if the Commissioner is made final and not subjected to either appeal or revision.

Section 7-B. Review of orders passed under Section 7-A.—(1) Any person aggrieved by an order made under sub-section (1) of Section 7-A, but from which no appeal has been preferred under this Act, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of such order may apply for a review of that order to the officer who passed the order :

Provided that such officer may also on his own motion review his order if he is satisfied that it is necessary so to do on any such ground.

(2) Every application for review under sub-section (1) shall be filed in such form and manner and within such time as may be specified in the Scheme.

(3) Where it appears to the officer receiving an application for review that there is no sufficient ground for a review, he shall reject the application.

(4) Where the officer is of opinion that the application for review should be granted, he shall grant the same :

Provided that,—

(a) no such application shall be granted without previous notice to all the parties before him to enable them to appear and be heard in support of the order in respect of which a review is applied for, and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the order was made, without proof of such allegation.

(5) No appeal shall lie against the order of the officer rejecting an application for review, but an appeal under this Act shall lie against an order passed under review as if the order passed under review were the original order passed by him under Section 7-A.

Section 7-C. Determination of escaped amount.—Where an order determining the amount due from an employer under Section 7-A or Section 7-B has been passed and if the officer who passed the order—

(a) has reason to believe that by reason of the omission or failure on the part of the employer to make any document or report available, or to disclose, fully and truly, all material facts necessary for determining the correct amount due from the employer, any amount so due from such employer for any period has escaped his notice ;

(b) has, in consequence of information in his possession, reason to believe that any amount to be determined under Section 7-A or Section 7-B has escaped from his determination for any period notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the employer,

he may, within a period of five years from the date of communication of the order passed under Section 7-A or Section 7-B, re-open the case and pass appropriate order re-determining the amount due from the employer in accordance with the provisions of this Act :

Provided that no order re-determining the amount due from the employer shall be passed under this section unless the employer is given a reasonable opportunity of

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representing his case.

Section 7-D. Employees' Provident Funds Appellate Tribunal.—(1) The Central Government may, by notification in the Official Gazette, constitute one or more Appellate Tribunals to be known as the Employees' Provident Funds Appellate Tribunal to exercise the powers and discharge the functions conferred on such Tribunal by this Act and every such Tribunal shall have jurisdiction in respect of establishments situated in such area as may be specified in the notification constituting the Tribunal.

(2) A Tribunal shall consist of one person only to be appointed by the Central Government.

(3) A person shall be qualified for appointment as a Presiding Officer of a Tribunal (hereinafter referred to as the Presiding Officer), unless he is, or has been or is qualified to be,—

(i) a Judge of a High Court ; or

(ii) a District Judge.

Section 7-E. Term of office.—The Presiding Officer of a Tribunal shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty two years, whichever is earlier.

Section 7-F. Resignation.—(1) The Presiding Officer may, by notice in writing under his hand addressed to the Central Government, resign his office :

Provided that the Presiding Officer shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(2) The Presiding Officer shall not be removed from his office except by an order made by the President on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the High Court in which such Presiding Officer had been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

(3) The Central Government may, by rules, regulate the procedure for the investigation of misbehaviour or incapacity of the Presiding Officer.

Section 7-G. Salary and allowance and other terms and conditions of service of Presiding Officer.—The salary and allowances payable to, and the other terms and conditions of service (including pension, gratuity and other retirement benefits) of, the Presiding Officer shall be such as may be prescribed :

Provided that neither the salary and allowances nor the other terms and conditions of service of the Presiding Officer shall be varied to his disadvantage after his appointment.

Section 7-H. Staff of Tribunal.—(1) The Central Government shall determine the nature and categories of the officers and other employees required to assist a Tribunal in discharge of its functions and provide the Tribunal with such officers and other employees as it may think fit.

(2) The officers and other employees of a Tribunal shall discharge their functions under the general superintendence of the Presiding Officer.

(3) The salaries and allowances and other conditions of service of the officers and other employees of a Tribunal shall be such as may be prescribed.

Section 7-I. Appeals to Tribunal.—(1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4) of Section 1, or Section 3, or sub-section (1) of Section 7-A, or Section 7-B [except an order rejecting an application for review referred to in sub-section (5) thereof] or Section 7-C, or Section 14-B, may prefer an appeal to a Tribunal against such notification or order.

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(2) Every appeal under sub-section (1) shall be filed in such form and manner,

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within such time and be accompanied by such fees, as may be prescribed.

Section 7-J. Procedure of Tribunals.—(1) A Tribunal shall have power to regulate its own procedure in all matters arising out of the exercise of its powers or of the discharge of its functions including the places at which the Tribunal shall have its sittings.

(2) A Tribunal shall, for the purpose of discharging its functions, have all the powers which are vested in the officers referred to in Section 7-A and any proceeding before the Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code and Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

Section 7-K. Right of appellant to take assistance of legal practitioner and of Government, etc., to appoint presenting officers.—(1) A person preferring an appeal to a Tribunal under this Act may either appear in person or take the assistance of a legal practitioner of his choice to present his case before the Tribunal.

(2) The Central Government or a State Government or any other authority under this Act may authorise one or more legal practitioner or any of its officers to act as presenting officers and every person so authorised may present the case with respect to any appeal before a Tribunal.

Section 7-L. Orders of Tribunal.—(1) A Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit confirming, modifying or annulling the order appealed against or may refer the case back to the authority which passed such order with such direction as the Tribunal may think fit, for a fresh adjudication or order, as the case may be, after taking additional evidence, if necessary.

(2) A Tribunal may, at any time within five years from the date of its order, with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1) and shall make such amendment in the order if the mistake is brought to its notice by the parties to the appeal :

Provided that an amendment which has the effect of enhancing the amount due from, or otherwise increasing the liability of the employer shall not be made under this sub-section, unless the Tribunal has given notice to him of its intention to do so and has allowed him a reasonable opportunity of being heard.

(3) A Tribunal shall send a copy of every order passed under this section to the parties to the appeal.

(4) Any order made by a Tribunal finally disposing of an appeal shall not be questioned in any court of law.

Section 7-M. Filling up of vacancies.—If, for any reason, a vacancy occurs in the office of the Presiding Officer the Central Government shall appoint another person in accordance with the provisions of this Act, to fill the vacancy and the proceedings may be continued before a Tribunal from the stage at which, the vacancy is filled.

Section 7-N. Finality of orders.—No order of the Central Government appointing any person as the Presiding Officer shall be called in question in any manner, and no act or proceeding before a Tribunal shall be called in question in any manner on the ground merely of any defect in the constitution of such Tribunal.

Section 7-O. Deposit of amount due, on filing appeal.—No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent of the amount due from him as determined by an officer referred to in Section 7-A :

Provided that the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

Section 7-P. Transfer of certain applications to Tribunals.—All applications which are pending before the Central Government under Section 19-A, before its repeal

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in relation to which such applications had been made as if such applications were appeals preferred to the Tribunal.

Section 7-Q. Interest payable by the employer.—The employer shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rates as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment :

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank.

Section 8. Mode of Recovery of moneys due from Employers.—To invoke Section 8 of the Act, the employer must be under a legal liability to transfer the assets. Any amount due may, if the amount is in arrear, be recovered in the manner specified in Sections 8-B to 8-G. Recovery may be made from the employer in relation to an establishment to which any Scheme or, the Insurance Scheme applies of any amount lying in arrear in respect of the following :

1. Any contribution payable to the Fund, or as the may be, the Insurance Fund ; or

2. Accumulations in any provident fund standing to the credit of the employees who become members of the Fund or, as the case may be the Insurance Fund established under the Scheme or, the Insurance scheme ; or

3. Accumulations to the credit of an employee exempted under Section 17(1), 17 (1-A) and 17(2) of the Act ; or

4. Damages recoverable under Section 14-B ; *i.e.*, for default in the payment of any contribution to the Fund, Family Pension Fund or the Insurance Fund or in the transfer of accumulations in any provident fund or in the transfer of accumulations to the credit of an employee exempted under Section 17(1), 17(1-A) and 17(2) of the Act ; or

5. Damages recoverable under Section 14-B for default in the payment of any charges payable under other provisions of this Act or the Scheme or the Insurance Scheme or under any of the conditions specified under Section 17 of the Act.

6. Any charges payable by the employer under any other provisions of the Act or Scheme or the Insurance Scheme.

Similarly recovery may also be made, in the manner specified in Sections 8-B to 8-G from an employer in relation to an exempted establishment, of any amount remaining in arrear in respect of the following :

(1) Damages recoverable under Section 14-B, as stated above in paras 4 and 5 of this section.

(2) Any charges payable by the employer to the Appropriate Government under any provisions of this Act or under any of the conditions specified under Section 17 or in respect of the contribution payable by him towards the Family Pension Scheme under the said Section 17.

But for the collection of any arrears the Provident Fund Commissioner must send the recovery certificate to the Collector of the district or the place where his office is situated. The Collector and not the Provident Fund Commissioner shall send the recovery certificate to the Collector of another district.[1] In a proceeding to recover the employer's contribution, the property of the employer attached by the Court, which was mortgaged to a bank, can be sold by the Court, subject only to the burden of the entire mortgage held by the Bank, notwithstanding the fact that the demand in respect of the employer's contribution accrued before the mortgage was executed by employer in favour of the Bank.[2] But if the amount of the employer's contribution has not been determined, no proceedings for recovery can be taken under this section.[3]

1. *Ballarpur Collieries Co.* v. *Coal Mines P.F. Commr.*, AIR 1962 Pat 450.
2. *State Bank of Indore* v. *R.P.F. Commr., Indore*, AIR 1965 MP 40.
3. *Lalan Kumar Sehgal* v. *Assistant Collector, Agra*, AIR 1965 All 373.

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Section 8-A. Recovery of moneys by employers and contractors.—Section 8-A of the Act provides that the amount of contribution that is to say, the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor either by deduction from any amount payable to the contractor, under any contract or as a debt payable by the contractor.

The contractor, from whom the amounts mentioned in sub-section (1) of this section may be recovered in respect of any employee's employed by or through him, may recover from such employee the employee contribution under any Scheme by deduction from the basic wages, dearness allowance and retaining allowance payable to such employee. The contractor shall not be entitled to deduct the employee's contribution or the charges on the basis of contribution for meeting the cost of administering the Fund paid or payable by an employer in respect of an employee employed by or through such contractor, from the basic wages, dearness allowance, and retaining allowance payable to an employee employed by or through him. The contractor shall also not be entitled to recover otherwise such contribution or charges from such employee.

Section 8-B. Issue of certificate to the Recovery Officer.—(1) Where any amount is in arrear under Section 8, the authorised officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the establishment or, as the case may be, the employer by one or more of the modes mentioned below :—

(a) attachment and sale of the movable property of the establishment or, as the case may be, the employer ;

(b) arrest of the employer and his detention in prison ;

(c) appointing a receiver for the management of the movable or immovable properties of the establishment or, as the case may be, the employer :

Provided that the attachment and sale of any property under this section shall first be effected against the properties of the establishment and where such attachment and sale is insufficient for recovering the whole of the amount of arrears specified in the certificate, the Recovery Officer may take such proceeding against the property of the employer for recovery of the whole or any part of such arrears.

(2) The authorised officer may issue a certificate under sub-section (1), notwithstanding that proceedings for recovery of the arrears by any other mode have been taken.

Section 8-C. Recovery Officer to whom certificate is to be forwarded.—(1) The authorised officer may forward the certificate referred to in Section 8-B to the Recovery Officer within whose jurisdiction the employer—

(a) carries on his business or profession or within whose jurisdiction the principal place of his establishment is situate ; or

(b) resides or any movable property of the establishment or the employer is situate.

(2) Where an establishment or the employer has property within the jurisdiction of more than one Recovery Officer and the Recovery Officer to whom a certificate is sent by the authorised officer—

(a) is not able to recover the entire amount by the sale of the property, movable or immovable, within his jurisdiction, or

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(b) is of the opinion that, for the purpose of expediting or securing the recovery of the whole or any part of the amount it is necessary so to do,

he may send the certificate or, where only a part of the amount is to be recovered, a copy of the certificate certified in the prescribed manner and specifying the amount to be recovered to the Recovery Officer within whose jurisdiction the establishment or the employer has property or the employer resides, and thereupon that Recovery Officer shall also proceed to recover the amount due under this section as if the certificate or the copy thereof had been the certificate sent to him by the authorised officer.

Section 8-D. Validity of certificate and amendment thereof.—(1) When the authorised officer issues a certificate to a Recovery Officer under Section 8-B, it shall not be open to the employer to dispute before the Recovery Officer the correctness of the amount, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer.

(2) Notwithstanding the issue of a certificate to a Recovery Officer, the authorised officer shall have power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate by sending an intimation to the Recovery Officer.

(3) The authorised officer shall intimate to the Recovery Officer any orders withdrawing or cancelling a certificate or any correction made by him under sub-section (2) or any amendment made under sub-section (4) of Section 8-E.

Section 8-E. Stay of proceedings under certificate and amendment or withdrawal thereof.—(1) Notwithstanding that a certificate has been issued to the Recovery Officer for the recovery of any amount, the authorised officer may grant time for the payment of the amount, and thereupon the Recovery Officer shall stay the proceedings until the expiry of the time so granted.

(2) Where a certificate for the recovery of amount has been issued, the authorised officer shall keep the Recovery Officer informed of any amount paid or time granted for payment, subsequent to the issue of such certificate.

(3) Where the order giving rise to a demand of amount for which a certificate for recovery has been issued has been modified in appeal or other proceeding under this Act, and as a consquence thereof, the demand is reduced but the order is the subject matter of a further proceeding under this Act, the authorised officer shall stay the recovery of such of the amount of the certificate as pertains to the said reduction for the period for which the appeal or other proceeding remains pending.

(4) Where a certificate for the recovery of amount has been issued and subsequently the amount of the outstanding demand is reduced as a result of an appeal or other proceeding under this Act, the authorised officer shall, when the order which was the subject-matter of such appeal or other proceeding has become final and conclusive, amend the certificate or withdraw it, as the case may be.

Section 8-F. Other modes of recovery.—(1) Notwithstanding the issue of a certificate to the Recovery Officer under Section 8-B, the Central Provident Fund Commissioner or any other officer authorised by the Central Board may recover the amount by any one or more of the modes provided in this section.

(2) If any amount is due from any person to any employer who is in arrears, the Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may require such person to deduct from the said amount the arrears due from such employer under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Central Provident Fund Commissioner or the officer so authorised, as the case may be :

Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court under Section 60 of

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the Code of Civil Procedure, 1908.

(3)(i) The Central Provident Fund Commissioner or any other officer authorised by the Central Board in this behalf may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the employer or, as the case may be, the establishment or any person who holds or may subsequently hold money for or on account of the employer or as the case may be, the establishment, to pay to the Central Provident Fund Commissioner either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due from the employer in respect of arrears or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the employer jointly with any other person and for the purposes of this sub-section, the shares of the joint-holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the employer at his last address known to the Central Provident Fund Commissioner or, as the case may be, the officer so authorised and in the case of a joint account to all the joint-holders at their last addresses known to the Central Provident Fund Commissioner or the officer so authorised.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, bank or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the employer or that he does not hold any money for or on account of the employer, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Central Provident Fund Commissioner or the officer so authorised to the extent of his own liability to the employer on the date of the notice, or to the extent of the employer's liability for any sum due under this Act, whichever is less.

(vii) The Central Provident Fund Commissioner or the officer so authorised may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in pursuance of such notice.

(viii) The Central Provident Fund Commissioner or the officer so authorised shall grant a receipt of any amount paid in compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged

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from his liability to the employer to the extent of the amount so paid.

(ix) Any person discharging any liability to the employer after the receipt of a notice under this. sub-section shall be personally liable to the Central Provident Fund Commissioner or the officer so authorised to the extent of his own liability to the employer so discharged or to the extent of the employer's liability for any sum due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Central Provident Fund Commissioner or the officer so authorised he shall be deemed to be an employer in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrears due from him, in the manner provided in Sections 8-B to 8-E and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under Section 8-B.

(4) The Central Provident Fund Commissioner or the officer authorised by the Central Board in this behalf may apply to the court in whose custody there is money belonging to the employer for payment to him of the entire amount of such money, or if it is more than the amount due, an amount sufficient to discharge the amount due.

(5) The Central Provident Fund Commissioner or any officer not below the rank of Assistant Provident Fund Commissioner may, if so authorised by the Central Government by general or special order, recover any arrears of amount due from an employer or, as the case may be, from the establishment by distraint and sale of his or its movable property in the manner laid down in the Third Schedule to the Income-tax Act, 1961.

Section 8-G. Application of certain provisions of Income-tax Act.—The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, shall apply with necessary modifications as if the said provisions and the rules refers to the arrears of the amount mentioned in Section 8 of the Act instead of to the income-tax :

Provided that any reference in the said provisions and the rules to the "assessee" shall be construed as a reference to an employer as defined in this Act.

Section 9. Recognition of Fund for the purpose of Income Tax.—For the purpose of Income Tax Act, 1922 the Fund shall be deemed to be a recognised provident fund within the meaning of Chapter IX-A of the Act. It has further been provided that in case of any repugnancy between the provisions of the Scheme under which the fund is established and those of Chapter IX-A of the Income Tax Act or of the rules made thereunder the provisions of the Scheme shall not be rendered ineffective.

Section 10. Protection against attachment.—Under Section 10 of the Act, the amount standing to the credit of any member in the Fund or any exempted employee in a provident fund shall not in any way be capable of being assigned or charged. It shall not be liable to attachment under any decree or order of any Court in respect of any debt or liability incurred by the member or the exempted employee. Further, neither the official assignee appointed under the Presidency Towns Insolvency Act, 1909, nor any receiver appointed under the Provincial Insolvency Act, 1920 shall be entitled to or have any claim on any such amount.

Sub-section (2) of Section 10 enacts that any amount standing to the credit of a member in the Fund or of an exempted employee in a provident fund at the time of his death and payable to his nominee under the Scheme or the rules of the Provident Fund shall, subject to any deduction authorised by the said Scheme or rules, vest in the nominee. Any amount so vested in the nominee shall be free from any debt or other

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liability incurred by the deceased or the nominee before the death of the member or of the exempted employee. It shall also not be liable to attachment under any decree or order of any court.

Sub-section (3) of Section 10 provides that the provisions of sub-section (1) and sub-section (2) shall so far as may be, apply in relation to the family pension or any other amount payable under the Family Pension Scheme and also in relation to any amount payable under the Insurance Scheme as they apply in relation to any amount payable out of the Fund.

Thus under sub-section (1) of Section 10 any amount standing to the credit of any member in the Fund or any exempted employee in a provident fund shall be subject to the following protections :

(1) It shall not in any way be capable of being assigned or charged ;

(2) It shall not be liable to attachment under any decree or order of any court in respect of any debt or liability incurred by the member or the exempted employee ;

(3) The Official Assignee under the Presidency-Towns Insolvency Act, 1909, or the Receiver under the Provincial Insolvency Act, 1920 shall not be entitled to or have any claim on, any such amount in case of the insolvency of the member or the exempted employee.

It was held in *Rameswar Lal Agarwala* v. *Kuti Mian*[1] that "the Act ordinarily applies to insolvent unless it is shown that he was an exempted employee. The burden lies upon the creditors to prove that the insolvent is an exempted employee and the Scheme under the Act would not apply in this case". It was further observed that even if a 'member' as defined in Section 2(j) leaves his service he could be regarded as member of Fund within the meaning of Section 10.

In *Vallabhaneni Ratnakumari & another* v. *Ketta Subbaravamma*[2] an employee of the Andhra Scientific Company which was taken over by Bharat Electronics Ltd. was a member of Group Insurance Scheme. He had borrowed Rs. 3,000, out of which only Rs. 500 was paid and the rest was remaining as balance at the time of his death. The Civil Court passed an attachment order for Rs. 4000 out of the General Insurance amount of Rs. 50,000 rupees standing in his name. It was held that a combined reading of sub-sections (1) and (2) of Section 10 of the E.P.F. Act makes it clear that the amount in question is not liable to be attached. Section 10(1) provides that the amount standing to the credit of any member of the Fund is not liable to attachment and the expression 'Fund' is defined in Section 2(h) of the Act.

It was held in *Nozer Gustad Commissariat* v. *Central Bank of India and others*,[3] that the use of the word 'vest' in Section 10(2) of the E.P.F. Act does not clothe a nominee with absolute title in respect of provident fund amount lying to the credit of the deceased. The nominee is merely authorised to receive the amount for benefit of heirs of the deceased. That is on the death of the subscriber the nominee does not become the owner of P.F. amount to the exclusion of heirs. In this case nomination was made in favour of brother of the deceased. It was held that the nomination is invalid because it can be made only in favour of a member of the family within the meaning of the word 'family' as defined in the Scheme and brother is not a member of the family.

Section 11. Priority of payment of contributions over other debts.—This section gives priority to certain payments where any employer is adjudicated insolvent

1. (1969) Lab IC 790 (Pat).
2. (1994) 2 LLJ 84 (AP).
3. (1993) 2 LLJ 98 (Bom).

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or, being a company, order of winding up is made. It applies where some amount is due from the employer in relation to an establishment to which any scheme or the Insurance Scheme applies as well as from the employer of an exempted establishment. According to clause (a) of sub-section (1) the following payments, due from the employer of an establishment to which any Scheme or the Insurance Scheme applies, shall get priority :

(i) any contribution payable to the Fund or, as the case may be, the Insurance Fund ; or

(ii) damages recoverable under Section 14-B ; or

(iii) accumulations required to be transferred under sub-section (2) of Section 15 ; or

(iv) any charge payable by the employer under any other provisions of this Act or any provisions of the Scheme or the Insurance Scheme.

According to clause (b) the following payments due from the employer of an exempted establishment, shall get priority :

(i) contribution to the provident fund or any insurance fund in so far as it relates to exempted employees ; or

(ii) under the rules of the provident fund or any insurance fund, any contribution payable by him towards the Family Pension Fund under sub-section (7) of Section 17 ; or

(iii) damages recoverable under Section 14-B ; or

(iv) any charges payable by the employer to the appropriate Government under any provision of this Act or under any of the conditions specified under Section 17.

Where the liability for any of the amounts due from the employer included in any of the categories covered by clauses (a) and (b) of sub-section (1) as stated above has accrued before the order of adjudication or winding up of the company it shall be deemed to be included among the debts under the following Acts which are to be paid in priority to all other debts :

(i) Section 49 of the Provincial Insolvency Act, 1920, or

(ii) Section 61 of the Presidency Towns Insovlency Act, 1909, or

(iii) Section 530 of the Companies Act, 1956.

It shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up, as the case may be.

Sub-section (2) provides that without prejudice to the provisions of sub-section (1) if any amount is due from an employer whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment. Any amount so due shall also, notwithstanding anything contained in any other law for the time being in force be paid in priority to all other debts.

Explanation.—In this sub-section and in Section 17, "insurance fund" means any fund established by an employer under any Scheme for providing benefits in the nature of life insurance to employees whether linked to their deposit in provident fund or not without payment by the employees of any separate contribution or premium in that behalf.

In *State Bank of Indore* v. *Regional Provident Fund Commissioner*[1] it was held that the omission of a provision in the Act creating a charge in the employer's property or giving a priority in cases not falling under Section 11 in the matter of the payment of the amount shows that a demand for the payment of the employer's contribution can

1. AIR 1965 MP 40.

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have no priority over other secured or unsecured debts.

Section 12. Employer not to reduce wages.—Section 12 of the Act provides that an employer in relation to an establishment to which any Scheme or the Insurance Scheme applies shall not reduce, whether directly or indirectly the wages of any employee to whom the Scheme or the Insurance Scheme applies or the total quantum of benefits in the nature of old age pension, gratuity or provident fund to which the employee is entitled under the terms of his employment, express or implied. But the above reductions by the employer shall not be made for the reasons only of his liability for the payment of any contribution to the Fund or the Insurance fund or any charges under this Act or the Scheme or the Insurance Scheme. That means any reduction made by the employer for any other reason not specifically provided in Section 12 of the Act is not prohibited.

In *R.K. Mohta and others* v. *Union of India & others*,[1] a school was contributing 8.33% of pay as contribution before application of the E.P.F. Act, but after the applicability of the Act the rate of contribution was reduced to 6.25% of the total pay. However this did not result in reduction in total quantum of benefits. The teachers and employees of the school challenged the percentage of reduction. It was held that Section 12 implies that the total amount of money which the employer was contributing should not be reduced after applicability of the Act. In the present case the total quantum has not been reduced, the employees are getting not less than what they were getting earlier. There is no reduction in quantum because after the application of the Act the whole amount of dearness allowance is taken into consideration for the purposes of calculating the provident fund. Therefore, if total amount of benefits is, not reduced, then only because of alteration in the rate of contribution, there is no violation of Section 12 of the Act.

In *Harihar Polyfibres* v. *R.P.F. Commissioner, Bangalore*,[2] the petitioner's establishment is covered by the E.D.F. Act with effect from January 1, 1975 after an application voluntarily made by it although it was entitled for infancy protection under Section 16(1)(b) of the Act. At the time of opting to be governed by the E.P.F. Act the petitioner agreed to pay contribution at the rate of 8% of the salary instead of 10% which they used to pay prior to the application of the Act to their establishment. The respondent initiated action under Section 7-A of the Act stating that the petitioner is bound to pay at the old rate of 10% as it was not entitled to reduce the percentage of contribution in view of Section 12 of the Act. It was held that the liability to make contribution is controlled by Section 6 of the Act which fixes the statutory limit by which the parties can make the contribution and if they agree to pay above that amount but less than what had already been agreed to Section 12 has no relevance at all. Section 12 has relevance only in a case where the amount of benefits is reduced by reason of liability arising under the Act, *i.e.*, reduction by reason of employer's liability for payment of contribution to the fund. In the present case both the employer and the employees had voluntarily offered to pay at the rate of 8% and not at 10%. Besides the employees in question in this case are all from the category of excluded employees.

Section 13. Inspectors.—Inspectors shall be appointed by the appropriate Government by notification in the Official Gazette, for the purposes of this Act or of any Scheme, the Family Pension Scheme or the Insurance Scheme. Section 13(1) also empowers the Appropriate Government to define jurisdiction of the Inspectors.

Powers and duties of Inspectors.—Powers and duties can be exercised by the Inspectors for the following purposes :

1. (1992) 2 Lab LJ 244 (Delhi).
2. (1991) 2 Lab LJ 477 (Karn).

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(1) enquiry into the correctness of any information furnished in connection with this Act, or with any Scheme, or the Insurance Scheme.

(2) ascertaining whether any of the provisions of this Act, or of any Scheme, or the Insurance Scheme have been complied with in respect of an establishment to which the Scheme or the Insurance Scheme applies, or

(3) ascertaining whether the provisions of this Act or any Scheme or the Insurance Scheme are applicable to any establishment to which the Scheme or the Insurance Scheme has not been applied, or

(4) determining whether the conditions subject to which exemption was granted under Section 17 are being complied with by the employer in relation to an exempted establishment.

For the purposes mentioned above, the Inspector shall have the following powers :

(a) He may require an employer or any contractor from whom any amount is recoverable under Section 8-A to furnish such information as he may consider necessary.

(b) He may enter and search any establishment or any premises connected therewith at any reasonable time and with such assistance, if any, as he thinks fit. He may also require any one found in charge of such establishment or premises to produce before him for examination any account books, registers and other documents relating to the employment of persons or the payment of wages in the establishment.

(c) He may examine, with respect to any matter relevant to any of the purposes aforesaid, the employer or any contractor from whom any amount is recoverable under Section 8-A, employer's agent or his servant or any other person found in charge of the establishment or any premises connected therewith or whom the Inspector has reasonable cause to believe to be or to have been an employee in the establishment.

(d) He shall make copies of, or take extracts from, any book, register or other document maintained in relation to the establishment. He shall, where he has reason to believe that any offence under this Act has been committed by an employer, seize with such assistance as he may think fit, such book, register or other document or portions thereof as he may consider relevant in respect of that offence.

(e) He shall exercise such other powers as the Scheme or the Insurance Scheme may provide.

According to sub-section (2-A) of Section 13 any Inspector appointed under sub-section (1) may for the purpose of inquiring into the correctness of any information furnished in connection with the Family Pension Scheme or for the purpose of ascertaining whether any of the provisions of this Act or of the Family Pension Scheme have been complied with in respect of an establishment to which the Family Pension Scheme applies, exercise all or any of the powers conferred on him under clause (a), clause (b), clause (c) or clause (d) of sub-section (2).

According to sub-section (2-B) of Section 13 the provisions of the Criminal Procedure Code, 1898 shall, so far as may be, apply to any search or seizure under sub-section (2) or under sub-section (2-A) as the case may be, as they apply to any search or seizure made under authority of a warrant issued under Section 98 of the Cr. P.C. The Inspector like a police officer is empowered to make a search in his own right. He has to observe the following formalities in conducting searches :—

(1) The person of the officials and of the search witnesses must be searched before they are allowed to enter premises so as to avoid any suspicion that

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any member of the search party had planted the thing recovered surreptitiously in the premises.

(2) The Inspector about to make a search shall call upon two or more respectable inhabitants of the locality in which the premises to be searched are situated to attend and witness the search.

(3) The search shall be made in the presence of such witnesses and a list of all things seized in the course of search and of the places in which they are respectively found shall be prepared by the officer or other persons.

(4) The said list shall be signed by such witnesses.

(5) The occupant of the place searched or some persons on his behalf shall be permitted during the searches.

(6) The copy of the list prepared and signed by the witnesses shall be delivered to such occupant.

The Inspector has power to make a report in writing of the facts constituting an offence punishable under the Act or under the Scheme with the previous sanction of such authority as may be specified in this behalf by the Appropriate Government.[1] If any person obstructs any Inspector appointed under the Act or the scheme in the discharge of duties or fails to produce any record for inspection by such Inspector he shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.[2]

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1. E.P.F. Act, 1952, Sec. 14(3).
2. E.P.F. Scheme Para 76.

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CHAPTER III
MISCELLANEOUS

Section 14. Penalties.—In order that a person may incur liability under sub-section (1) of Section 14 of the Act, it must be proved that :—

(1) the accused made or caused to be made any false statement or false representation ;

(2) such making or causing was done knowingly ; and

(3) such making or causing was done for the purpose of :

(i) avoiding any payment to be made by himself under this Act, the Scheme, the Family Pension Scheme or the Insurance Scheme made thereunder ; or

(ii) enabling any other person to avoid such payment.

The accused, shall under this section, be punishable with imprisonment for a term which may extend to one year or with fine of five thousand rupees, or with both.

Sub-section (1-A) provides that an employer shall be punishable with imprisonment for a term which may extend up to three years if :—

(i) he contravenes or makes default in complying with the provisions of Section 6 or clause (a) of sub-section (3) of Section 17 in so far as it relates to the payment of inspection charges, or

(ii) he contravenes or makes default in complying with the provisions of paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges.

But the term of imprisonment shall not be less than one year and a fine of ten thousand rupees in case of default in payment of the employee's contribution which has been deducted by the employer from the employee's wages. In any other case the term of imprisonment shall not be less than six months and a fine of five thousand rupees. Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term.

Sub-section (1-B) provides that an employer who contravenes, or makes default in complying with, the provisions of Section 6-C, or clause (a) of sub-section (3-A) of Section 17 in so far as it relates to the payment of inspection charges, shall be punishable with imprisonment for a term which may extend to one year but which shall not be less than six months and shall also be liable to fine which may extend to five thousand rupees :

Provided that the court may, for any adequate and special reasons to be recorded in the judgment impose a sentence of imprisonment for lesser term.

Sub-section (2) of Section 14 enacts that the Scheme, the Family Pension Scheme or the Insurance Scheme framed under this Act may provide for an offence consisting of the following ingredients :—

(1) that the accused has contravened, or made default in complying with any of the provisions of the Scheme, the Family Pension Scheme or the Insurance Scheme, and

(2) that the Scheme, the Family Pension or the Insurance Scheme has provided penalty for such contravention or default.

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The maximum penalty for the above offences prescribed by any such Scheme may extend to one year imprisonment or fine extending to rupees four thousand or both.

Sub-section (2-A) of Section 14 creates an offence consisting of the following ingredients :—

(1) The accused contravened or made default in complying with—
  (i) any provision of this Act, or
  (ii) any condition subject to which exemption was granted under Section 17, and

(2) no other penalty is elsewhere provided by or under this Act for such contravention or non-compliance.

Any person guilty of the above offence is punishable with imprisonment which may extend to six months, but which shall not be less than one month, and shall also be liable to fine which may extend to five thousand rupees.

In *Subbarama Chetty* v. *Zewar Ali*,[1] a partnership firm in the name and style of Sri Rama Weaving Shed, engaged in manufacturing silk goods was dissolved by a registered agreement entered into by the parties. The assets and liabilities were divided between the parties of the firm. The Provident Fund Commissioner disbursed the Provident Fund to all the employees of the firm. About a year after dissolution, one of the partners of the firm restarted business of manufacturing silk goods in a portion of the premises making use of some looms that had come to his share at the time of dissolution and were lying idle somewhere in premises of the old factory. He employed less than twenty labours. He was prosecuted and convicted by the Magistrate of an offence under Para 76 of the E.P.F. Scheme read with Section 14 of the Act. In appeal the High Court observed that there was absolutely no justification for the Magistrate to assume that the petitioner started the new factory to defeat the claim of his employees to the advantage of the Provident Fund. It was further contended on behalf of the respondents that once the provisions of the Act and the Scheme framed under the Act were made applicable to a factory, the liability to pay the employer's share of the Provident Fund is fixed to the machinery. Once it is proved that some machinery that was originally used for manufacturing purposes is subsequently used in another factory run in the same or other premises, the person who uses such machinery subjects himself to the liability of paying his share of provident fund irrespective of the fact, whether he has employed the same persons who were previously employed or not. Repelling these arguments the High Court observed that :

> "There is no provision in the Act which holds the machinery used in a factory liable. To hold that any person that purchases a machinery from a factory to which the provisions of the Act and the Scheme framed thereunder had been made applicable will be subject to liability if he starts new factory with the use of the same machinery irrespective of the fact that the number of employees employed by him is less than twenty appears to be ridiculous. It also cannot be accepted as correct that if one of the partners of the old firm starts a new business with a part of the machinery that fell to his share, it should be presumed that the new factory is part of the sub-division of the old factory and therefore is liable to contribute towards the Provident Fund of the Employees irrespective of the fact that the number of employees in the new firm started by him is less than twenty."[2]

Section 14-A. Offences by companies.—If any offence under the Act, the Scheme, the Family Pension Scheme or the Insurance Scheme under the Act is committed by a company, the officers of the company as well as the company shall be

1. AIR 1960 Mys 14.
2. *Subbaramma Chetty* v. *Zewar Ali*, AIR 1960 Mys 14.

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liable for it. The liability under this section rests on two categories of officers : on every person who at the time the offence was committed was incharge of and was responsible to the company for the conduct of the business of Company as well as on the Company. In other words any person in direct management of the affairs of the company shall be deemed liable to punishment for the offence. Any such officer, shall not be liable to an offence provided he proves that (i) the offence was committed without his knowledge, or (ii) that he exercised all due diligence to prevent the commission of it.

Sub-section (2) of Section 14-A makes the director, manager, secretary or other officers of the company liable for any offence committed under the Act, the Scheme, Family Pension Scheme or the Insurance Scheme made under the Act, by a company provided it is proved that the offence was committed with the consent, connivance or neglect of the officer concerned.[1]

The onus primarily lies upon the prosecution to prove that the person indicted was incharge of the affairs of the company. If that onus is discharged by the prosecution it shall lie upon the accused to prove that the offence was committed without his knowledge or he exercised due diligence to prevent commission of it. Further *mens rea* is not necessary element of the offence for if that were so, the whole Scheme shall be rendered nugatory and a large number of employees will be deprived of the benefit of his benevolent legislation.[2]

Explanation.—For the purposes of this section "company" means any body corporate and includes a firm and other association of individuals ; and "director" in relation to a firm, means a partner in the firm.

It was held in *Bhuban Mohan Bose and others* v. *The State*,[3] that in order to hold the directors vicariously liable for the offence committed by the Company, it has to be shown that not only such persons were incharge of the company but they were also responsible to the company in the conduct of day to day business. He must be a person who is directing the unit of the company and must be in actual control of the company's operation.

In *Srikanta Datta Narasimharaja Wodiyar* v. *Enforcement Officer, Mysore*[4] the appellant who is one of the Directors of the Company was declared as one of the persons in charge of and responsible for the conduct of business of the establishment. Therefore it was held that his prosecution for violation of the Scheme by the company does not suffer from any error of jurisdiction or law.

Section 14-AA. Enhanced punishment in certain cases after previous conviction.—Whoever, having been convicted by a Court of an offence punishable under this Act, the Scheme, the Family Pension Scheme or the Insurance Scheme commits the offence shall be subject for every such subsequent offence to imprisonment for a term which may extend to five years but which shall not be less than two years and shall also be liable to fine of twenty five thousand rupees.

Section 14-AB. Certain offences to be cognizable.—Notwithstanding anything contained in the Code of Criminal Procedure, 1898 an offence relating to default in payment of contribution by the employer punishable under this Act shall be cognizable.

Section 14-AC. Cognizable and trial of offences.—(1) No Court shall take cognizance of any offence punishable under this Act, the Scheme, the Family Pension Scheme or the Insurance Scheme except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government,

1. *State* v. *S.P. Bhandari*, AIR 1959 Pat 9.
2. *State* v. *S.P. Bhandari*, AIR 1959 Pat 9.
3. (1991) 1 Lab LJ 11 (Calcutta).
4. (1993) 2 LLJ 531 (SC).

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by notification in the *Official Gazette* in this behalf, by an Inspector appointed under Section 13.

(2) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act or the Scheme, the Family Pension Scheme or the Insurance Scheme.

It was held in *State of Maharashtra* v. *Pankaj A. Gupta*,[1] that in view of Section 14-AC unless the sanction is filed along with the complaint no court shall take cognizance of any offence punishable under the Act. In this case no sanction order was filed, therefore the Magistrate was justified in dismissing the complaint.

Section 14-B. Power to recover damages.—The employer shall be liable to pay damages if :

(i) he fails to pay any contribution to the Fund, the Family Pension Fund or the Insurance Fund ; or

(ii) he commits a default in transfer of accumulation required to be transferred by him, under Section 15(2) standing to the credit of employees who become members of the Fund established under the scheme ; or

(iii) he commits a default in transfer of accumulations, required to be transferred by him under Section 17(5), to the credit of every employee to whom exemption has been granted under Section 17 of this Act ; or

(iv) he commits a default in the payment of any charges payable under any other provisions of this Act or any Scheme or Insurance Scheme or under any of the conditions specified under Section 17.

The Central Provident Fund Commissioner or such other officer as may be authorised by the Central Government by notification in the *Official Gazette* in this behalf may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the Scheme.

Provided that before levying and recovering such damages, the employer shall be given a reasonable opportunity of being heard. Provided further that the Central Board may reduce or waive the damages levied under this section in relation to an establishment which is a sick industrial company and in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under Section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in the Scheme.

No period of limitation is prescribed for levy or recovery of damages from the defaulter under Section 14-B.[2] It was held in *M/s. Mathur Alloy Steels Pvt. Ltd. & another* v. *Union of India & others*,[3] that where no limitation was prescribed by the legislature the court cannot introduce any such limitation on the ground of fairness or justice. Delay in issuing show cause notice by the P.F. Commissioner by itself cannot vitiate the proceedings for levying damages under Section 14-B. Since the nature of levy under Section 14-B is punitive and as the State Government is required to consider the facts of each case while exercising its discretion, it would require an inquiry in consonance with the principles of natural justice. Therefore, in exercising the power of imposing damages the party affected must be given an opportunity of being heard. Failure to give such an opportunity to the employer would render the imposition of damages null and void.[4] While imposing damages under Section 14-B, the authority

1. (1995) 1 LLJ 780 (Bom).
2. *Shyam Glass Works* v. *State*, AIR 1979 All 19.
3. (1993) 2 LLJ 471 (Bom).
4. *Shyam Glass Works* v. *State*, AIR 1979 All 19.

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must pass a speaking order, otherwise it is null and void.[1]

In *Mohammed Haneefa* v. *Union of India*,[2] the mode of calculating the damages under Section 14-B of the Act was challenged. It was held that in quantifying the damages, regard should be had to the circumstances under which the default has been committed. The petitioner's contention that if he was told about the default in time he would not have repeated it was held to be well founded.

In *Sri Rajendra Mills* v. *Regl. Commr. E.P.F.*,[3] it was held that such factories, as are out of the control of industry, are important in determining the damages. Flood, power cut, direction by law and order by authorities to close down factories during public unrest are some of the relevant circumstances for sympathetically considering the claims of such industries in non-payment of contributions and other remittances under the Act.

It was held in *Poysha Industrial Co. Ltd.* v. *Union of India & others*,[4] that under the proviso to Section 14-B the Central Board may reduce or waive damages levied under that section in relation to an establishment which is sick industrial company. Therefore where the Central Board exercises jurisdiction by not considering the fact that the establishment is a sick Industrial Company in respect of which a rehabilitation scheme has been sanctioned, the court can set aside the order of the Central Board. In this case damages were levied for non-payment of contribution by the petitioner company which was declared sick. Therefore the order of damages was held to be bad in law.

But in *Calicut Modern S. & W. Mill* v. *Regional P.F. Commr.*,[5] it was held that even in those cases where the employer was unable to pay wages for reasons beyond his control, he would be liable to pay contributions. In such a case the authority does not have discretion to condone the delay. It can only mitigate the amount of damages having regard to the attendant circumstances that had resulted in the delay but failure to pay will always attract Section 14-B.

It was held in *Vinson Engineering Company* v. *Regional P.F. Commissioner*,[6] that opportunity to show cause and of being heard before levying damages is inherent under Section 14-B of the E.P.F. Act. That delay in remitting the contribution was caused for the reasons beyond the control of the employer, that loss to the employees is minimal, that delay was unintentional, that employer has not neglected his duty to make the contributions are some such pleas that may mitigate against the imposition of damages and these aspects are to be considered by the Authority before imposing damages. In such consideration, the competent Authority shall also take the delay at his end as a ground mitigating against the damages. Therefore whether the delay is on the part of the employer or the competent Authority, the interest of the employees should not be made to suffer.

Similarly in *Prajatantra Prachar Samiti* v. *R.P.F. Commissioner*,[7] the petitioner challenged the order of the respondent directing recovery of Provident Fund Contributions along with damages under the Orissa Public Demands Recovery Act. The quantum of contributions was not in dispute but the manner in which damages have been levied was questioned. It was held that damages under Section 14-B is intended

1. *Star of Gujarat Textile Mills Ltd.* v. *Regional P.F. Commissioner & another*, (1993) 1 LLJ 1023 (Guj).
2. (1979) 1 LLJ 46 (Kerala).
3. (1982) 1 LLJ 350 (Madras).
4. (1995) 2 LLJ 137 (Calcutta).
5. (1982) 1 LLJ 440 (Kerala).
6. (1995) 2 LLJ 1224 (Madras).
7. (1979) 1 LLJ 136 (Orissa).

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to compensate the loss to the beneficiaries of the P.F. Scheme ; but not anything more as such recovery would amount to penalty and that is not permitted under this section.

Levy of damages is not a must in every case. The appropriate Authority is vested with discretion to recover damages alongwith the contribution. There may be cases, where for good reasons, the Authority may decide not to assess damages and once he decides to levy damages, it is in the discretion of the authority to qualify the damages within the upper limit depending upon the fact of the case.[1]

In *Organo Chemical Industries* v. *Union of India*,[2] the Supreme Court held that Section 14-B of the Act is not unconstitutional because this section does not confer unguided and uncontrolled discretionary power upon the Regional Provident Fund Commissioner. It can also be accepted that there are no guidelines provided for fixing the quantum of damages, the power of the Commissioner to impose damages, under Section 14-B is a *quasi* judicial function. It must be exercised after notice to the defaulter and after giving him a reasonable opportunity of being heard. The only requirement of Section 14-B is that the competent authority must apply its mind to the reasons and justifications shown by the employer for default and must state the reasons in support of order passed.[3]

In *Josts Engineering Limited, Bombay* v. *Union of India*,[4] the Bombay High Court held that an analysis of the judgment of *Organo Chemical Industries* v. *Union of India*,[5] would show that the damages contemplated under Section 14-B covered (a) compensation for actual loss and (b) the punitive element : and secondly that the authority assessing the damages was obliged to write a speaking order of his assessment setting out the reason for it so that it was readily exposed to scrutiny of a Court.

If an employer does not deposit the contribution, the default in payment itself is sufficient to recover damages from the employer without proof of loss since such loss to the fund must have been implied by the legislature when this provision was made. Section 14-B, itself cannot be regarded as contravening Article 14 of the Constitution. If in actually applying Section 14-B, the Government acts without considering the fact of a particular case, that particular order may be assailed as arbitrary.[6]

The question whether damages should be claimed for delayed payment of contribution and if so what should be the amount of such damages is one that should be decided only after giving notice to the person concerned and giving him a reasonable opportunity of representing his case because a claim for compensation under Section 14-B being an amount payable under the provisions of the Act, Section 7-A will apply to such a case.[7] Damages under this section is a penal levy though imposed by administrative authority and it is necessary to give the party affected a reasonable opportunity to show cause before it is levied.[8]

In the *Regional Provident Fund Commissioner, Tamil Nadu* v. *The South India Flour Mills Pvt. (Ltd.)*[9] the Court had to determine two questions, namely, (1) what are the powers of the Commissioner in respect of recovery of damages, and (2) whether the provisions of Section 73 of the Contract Act 1872, can be made applicable for

1. (1979) 1 LLJ 136 (Orissa).
2. (1979) 2 LLJ 416 (SC).
3. *Bilaspur Spinning Mills and Industries Ltd.* v. *Union of India & another*, (1995) 1 LLJ 660 (MP).
4. (1983) 2 LLJ 436 (Bombay).
5. (1979) 2 LLJ 416 (SC).
6. *Atlantiq Engineering Service (P) Ltd.* v. *Union of India*, (1979) 2 LLJ 139 (Delhi).
7. *O.V. Estate* v. *Regional P.F. Commissioner*, (1970) 1 Mad LJ 638.
8. *Madras Bangalore Transport Co.* v. *Regional Provident Fund Commr. Madras*, (1970) Lab IC 96 (Mad).
9. (1985) 1 LLJ 283 (Mad).

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determining damags under this section ?

Regarding the first question the Court held that under this section the Commissioner is required to determine after hearing the defaulter, as to whether the defaulter is liable to pay damages or not. If he is satisfied with the reasons given by the defaulter then the question of recovering damages or determining quantum of damages does not arise. But if he is not satisfied he will proceed to determine the quantum of damages. Hearing before the Commissioner is in respect of two matters, namely, the liability to pay damages and quantum of damages. The first one includes also liability other than mere compensation to the employees who have sustained loss.

Regarding the second question it was held that damages under this section cannot be recovered on the basis of principles contained in Section 73 of the Contract Act. Section 14-B is a penal provision, therefore, it must take in for consideration the extent of default and the frequency with which the employer is committing the default. The object of Section 14-B is to penalise defaulting employer as also to provide reparation for the amount of loss suffered by the employees.

In *Telangana Spinning & Weaving Mills Ltd. and another* v. *Regional P.F. Commissioner and another*,[1] the validity of the show cause notice for damages was challenged on the ground that it did not mention the amount of damages. It was held that assessment of damages is with the discretion of R.P.F. Commissioner, which has to be exercised fairly and reasonably and not arbitrarily. Determination of damages, though discretionary, depends on various factors such as amount of arrears, habitual nature of the employer in committing default, explanation submitted by the employer and the interest lost due to non-investing the amount in time. So in the very nature of things, the quanum of damages cannot be pre-determined so as to be mentioned in the show cause notice. Therefore, the show cause notice cannot be held invalid on that ground.

The purpose of imposition of damages under Section 14-B is twofold : One to penalise the defaulting employer and to conveying a warning to employers in general and second to recompense the employees for the loss sustained by them. In *Regional Provident Fund Commissioner* v. *K.T. Rolling Mills Pvt. Ltd.*,[2] the Commissioner imposed damages for default in depositing contributions but the High Court set the same aside solely on the ground of delay. The power for levying damages was delegated to the Commissioner in 1973 and proceedings were initiated by the Commissioner in 1985. It was held by the Supreme Court that though the period of delay is unreasonably long but keeping in view the fact that there were a large number of establishments in Maharashtra and only one Regional P.F. Commissioner, the order does not merit to be struck down only on ground of delay, when it is kept in mind that the delay in default related to the contribution of the employees which money the respondent must have used for its own purpose without even paying interest. Therefore the order of the High Court was set aside by the Supreme Court.

It was held in *M/s Hindustan Times Ltd.* v. *Union of India*,[3] that the authority under Section 14-B has to apply his mind to the fact of the case and the reply to the show cause notice and pass a reasoned order after following principles of natural justice and giving a reasonable opportunity of being heard the Regional Provident Fund Commissioner for initiating proceedings under Section 14-B usually takes into consideration the number of defaults, the period of delay, the frequency of default and the amount involved.

It was further held that the Act does not contain any provision presenting a period of limitation for assessment or recovery of damages. It is not the legislative intention to prescribe any period of limitation for computing and recovering the arrears.

Section 14-C. Power of Court to make orders.—(1) Where an employer is convicted of an offence of making default in the payment of contribution to the Fund, the Family Pension Fund or the Insurance Fund or in the transfer of accumulations required to be transferred by him under sub-section (2) of Section 15 or sub-section (5) of Section 17, the Court may in addition to awarding any punishment by order in writing require him, within a period specified in the order which the Court may, if it thinks fit and on application in that behalf, from time to time extend, to pay the amount of contribution or transfer the accumulations, as the case may be, in respect of which the offence was committed.

1. (1992) 2 Lab LJ 180 (AP).
2. (1995) 1 LLJ 882 (SC).
3. AIR 1998 SC 688.

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(2) Where an order is made under sub-section (1), the employer shall not be liable under this Act in respect of the continuation of the offence during the period or extended period, if any, allowed by the Court, but if, on the expiry of such period or extended period, as the case may be, the order of the Court has not been fully complied with, the employer shall be deemed to have committed a further offence and shall be punished with imprisonment in respect thereof under Section 14 and shall also be liable to pay fine which may extend to one hundred rupees for every day after such expiry on which the order has not been complied with.

Section 15. Special Provisions relating to existing Provident Fund.—Subject to the provisions of Section 17 every employee shall continue to be entitled to the benefits accruing to him under the existing Provident Fund, pending the application of a scheme to an establishment provided :

(1) that he was a subscriber to any provident fund ; and

(2) that he was an employee of an establishment to which this Act applies.

It is further provided that the provident fund shall continue to be maintained in the same manner and subject to the same conditions as it would have been if this Act had not been passed.

Section 15(2) lays down that on the application of any scheme to an establishment, the accumulation in any Provident Fund of the establishment standing to the credit of the employees' who become members of the Fund established under the Scheme shall be transferred to the Fund Established under the Scheme, and shall be credited to the account of the employees entitled thereto in the Fund. Any such transfer shall be subject to the provisions, if any, contained in the Scheme in this connection. It shall not be subject to anything to the contrary contained :

(i) in any law for the time being in force ; or

(ii) in any other instrument establishing provident fund.

Para 28 of the Employees' Provident Fund Scheme deals with the transfer of accumulations from existing Provident Funds. Accumulations in the existing Fund are under Section 15(2) transferable to the Fund established under the new Scheme. For effecting such transfer certain steps as provided in Para 28 of the Scheme are to be taken by the authorities. But if the authorities concerned do not take the necessary steps and keep the matter pending for years that does not mean that the fund under the new scheme has not been established, nor does it mean that the accumulations do not become vested in the new Scheme. In other words the fund may come into being even before the steps prescribed by para 28 of the E.P.F. Scheme are taken but the accumulation does not vest in the Fund so long as they are not actually transferred and necessary formalities effected thereto.

In *Kokkali Rice & Oil Mills Foundry* v. *R.P.F. Commissioner*,[1] the Regional Provident Fund Commissioner had repeatedly asked the applicants to remit the contributions of Provident Fund as due because their Factory was covered by the Act. He also threatened the employer to take appropriate action for his default. In this case as observed by the High Court, it was not open to the employer to say that since the respondent did not collect the contribution in due time, he could not now be allowed to collect or realise the same for the period that had gone by.

Section 16. Act not to apply to certain establishment.—This Act shall not apply—

(a) to any establishment registered under the Co-operative Societies Act, 1912 or under any other law for the time being in force in any State relating to co-operative societies employing less than fifty persons and working without

1. A.I.R. 1961 Ker. 5

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the aid of power ; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any Scheme or rule framed by the Central Government or the State Government governing such benefits ; or

(c) to any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits.

According to sub-section (2) any class of establishment may be exempted whether prospectively or retrospectively by the Central Government from the operation of the Act for such period as may be specified by a notification in the Official Gazette. The exemption under Section 16(2) can be granted by the Central Government keeping in view the financial position of such establishment or other circumstances of the case. Any such exemption shall be subject to such conditions as may be specified in the notification issued by the Central Government.

The object of Section 16 is to allow establishment sufficient time to acquire stability to enable it to contribute towards Provident Fund Scheme.[1] In the absence of any order of the Central Government specially exempting an establishment from the operation of the Act, the scheme becomes automatically applicable after the expiry of the prescribed period inspite of the fact that the R.P.F. Commissioner had required the establishment to implement the scheme after a lapse of another year. "The employer's liability to contribute to the provident fund was co-extensive with the application of the Act and the scheme to his factory and could be enforced retrospectively for the pre-discovery period."[2]

In *Mandovi Pellets Ltd.* v. *Union of India*,[3] the industry was set up in 1976 and started production in 1979. In 1981 on account of power shortage and other difficulties, the plant could hardly maintain its production level at 50%. The plant was closed for one year and then it was extended to two years and thereafter again for 3 years. Afterwards the plant was never opened. It was held that at the end of infancy protection period, the plant was not in existence and hence the Act is not applicable.

In *Sri Balaji Enterprise* v. *P.F. Commissioner*,[4] the petitioner was given a licence by Burmah Shell to run a petrol pump and the Provident Fund Commissioner asked contributions to the Employees' Provident Fund on the plea that the business was a continuation of old establishment (*i.e.*, Burmah Shell). It was held that the petitioner was only a licensee and that he was given a licence to sell petroleum products in the filling station and for that purpose to use the building and other installations at the filling station. The Burmah Shell has no control over the manner in which the petitioner carried on the business except that dealership should be carried on efficiently to the satisfaction of public and that maximum price fixed should not be exceeded. Therefore, it was a new business started by the petitioner.

1. *S.V. Palanimal* v. *R.P.F. Commissioner*, (1962) 2 Mys LJ 392.
2. *Gulshan Khandsari Udyog* v. *Union of India*, AIR 1959 All 432.
3. (1989) 2 Lab LJ 364 (Bombay).
4. (1986) 2 LLJ 380 (Madras).

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An establishment shall not be deemed to be newly set up merely by reason of change in its location. The date of establishment of a factory is the date when the factory starts its manufacturing process. The fact that a new company or concern subsequently takes over or acquires the factory does not shift the date of the establishment of the factory to the date of taking over or acquisition nor does the fact that the factory had ceased to produce goods for a certain time and resumed production after certain brief intervals, result in extinction of the old factory and establishment of a new factory.[1] The ownership[2] or management[3] does not make any difference in the application of Section 16 of the Act. Similarly temporary cessation of the manufacturing process in a factory which has already come into existence does not make it a new factory under the Act.[4]

In *Sayaji Mills Ltd.* v. *P.A. Bhashkar*,[5] a Cotton Mill Manufacturing Textile goods since 1931 was ordered to be wound up in December, 1951. Prior to this the mill had discharged all its workers and the manufacturing operations had come to an end. Sayaji Mills, a limited company purchased the Mill in July, 1955, from the official liquidator and commenced manufacturing operation in November, 1955. The plaintiff claimed exemption under Section 16(1) of the Act on the ground that the mill was renovated and set up in November, 1955, and the Act would not apply to its establishment from that date for a period of three years. It was held that "the provisions of the Act and the Scheme were applicable to the mill since the plaintiff had not established by evidence that a new factory was established". It was further observed that "Section 16(1) creates an exemption in favour of infant factories and not in favour of persons who run those factories. The mere circumstances that the ownership has changed hands cannot justify the conclusion that the Act will cease to apply to the particular establishment if prior to the change of hands the Act was applicable to it".[6] The period of infancy mentioned in Section 16(1)(b) of the Act should be calculated from the first day of the establishment of the factory and not from the amount of time when the figure of employment of 20 or more workmen is first reached.[7]

The effect of transfer of ownership on the application of Section 16(1) was considered by the Supreme Court in *The Provident Fund Inspector, Trivandrum* v. *The Secretary N.S.S. Co-operative Society*.[8] In this case a printing press established in 1946 was sold in 1961. The machinery of the press was altered, persons previously in service were not continued, instead a fresh recruitment was made and the work in press was started after a gap of three months. Compensation was paid to the workmen at the time of the previous owner. It was held that the "old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later so that the benefit of non-applicability of Section 16(1) for the period of three years was available to the respondent".

Where on the expiry of lease of a theatre a new partnership firm took out a fresh lease and employed a number of employees, the employer was liable to pay contribution towards the provident fund of the employees as there was no break in the continuity of the establishment.[9]

A Hindu undivided family owned a theatre consisting of the land, building, talkies

1. *Bharat Board Mill Ltd.* v. *Regional Provident Fund Commissioner*, AIR 1957 Cal 702.
2. *R.P.F. Commissioner* v. *L.R.E. Works*, AIR 1952 Punj 507.
3. *Nazeena Traders (P) Ltd.* v. *R.P.F. Commissioner, Hyderabad*, AIR 1965 AP 200.
4. *Loon Karan Sethiya Nandan* v. *Additional Collector, Agra*, AIR 1965 All 373.
5. AIR 1970 Bom 418.
6. *Ibid.*
7. *State of Punjab* v. *Satpal*, AIR 1970 SC 655.
8. AIR 1971 SC 82.
9. *Regional Provident Fund Commissioner* v. *Chandrasekharamath*, (1969) 2 MLJ 118.

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equipment, machinery, other fitting and furniture. It was leased to a lessee who was making provident fund contributions. On the expiry of the lease one of the representatives of the joint family took the lease and started the business from 1st April, 1962. The prior lessee had discharged all his employees, but 17 out of 19 employees of the new firm were persons employed by the previous lessee. The question was whether it was a new establishment entitled for exemption under Section 16 of the Act. It was held that "the lease taken by the respondent firm to run theatre would not make the establishment a new one for the purpose of claiming exemption..... (and) the exemption available under Section 16(1) of the Act is to the organisation or establishment itself as such, and not to owner or lessee or Manager thereof and it cannot be postulated that each time there is a change of hand a new establishment has been set up."[1] It was further observed that 'establishment' means house of business and it is not the same thing as 'employer' or 'employee'.[2]

The function of the Commissioner to decide whether Section 16(1) of the Act applied or not is not purely of administrative nature, instead it involves some sort of quasi-judicial process which requires the Commissioner to consider various factor raised by the parties.[3]

One Hindustan Electric Company owned by the Government was engaged in manufacturing of stoves for domestic use which is not a scheduled industry. It was purchased by respondents who were engaged in manufacture of motor parts. It was contended by the respondent that three years have not elapsed from the date they started manufacturing motor parts. Therefore, it was exempted under Section 16 of the Act. It was held that Section 16 covers only those factories since the establishment of which three years have not elapsed.[4] In the present case at the time the Regional Provident Fund Commissioner made his demand the factories were admittedly engaged in scheduled industries.[5]

Some manufacturing process was being carried on in certain premises before the Act came into force. There was a dispute between members of the family carrying on the business. The dispute was referred for arbitration. One of the members of the family started some manufacturing process with the machinery that fell in his share in the same premises but under a different name. Some workers of the previous factory were employed by the new employer. It was held that the new business cannot be said to be a new establishment, so as to exempt it from provisions of the Act for 3 years.[6]

In *S.V. Palanimalai* v. *R.P.F. Commissioner*,[7] the petitioner along with his father and brothers was carrying on business of sale and manufacture of agarbattis. The firm was dissolved on 13-4-1963 and the petitioner started new partnership business in oodubattis with sons as partners on 20-4-1963. The question was whether the new partnership firm is entitled to infancy protection under Section 16(1) of the Act. The test to be applied in such cases is whether there was an existing establishment the operations of which are continued by an establishment which came into existence subsequently. "In the present case the dissolution of the old partnership being genuine and good the business of the said partnership came to an end on the date of the dissolution. If an old partner of the firm enters into a partnership with others and carries on a business activity similar to that carried on by the dissolved firm, it would be wrong to contend that the

1. *The Regional Provident Fund Commissioner* v. *Vithaldas Jagnanthadas*, (1969) 2 MLJ 178.
2. *Ibid.*
3. *Binod Mill Co.* v. *R.P.F. Commissioner*, (1971) 1 LLJ 144.
4. *R.P.F. Commissioner* v. *L.R.E. Works*, AIR 1962 Punj 507.
5. *Ibid.*
6. *Jay Bharat Woollen Silk Mills* v. *R.P.F. Commissioner*, 23 FZR 425.
7. (1971) 1 LLJ 44.

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establishment of the new partnership is the continuance of the dissolved partnership". In *Devi Press* v. *R.P.F. Commissioner, Madras*,[1] it was held that in case of voluntary liquidation of a company, whose business is purchased by its managing agents who form a new partnership, the subsequent partnership firm would not be liable to pay contribution in respect of new employees.

In *D. Appavoo Prop. Chandra Bus Services, Thanjavur* v. *The Regional Commissioner, P.F.*,[2] a transport business was owned by father. In a partition between the father and two sons two buses with route permits were allotted to father and three buses with route permits were allotted to two sons. Inspite of partition buses were operated with the same employees and there was no closure or stoppage of business at any time. Sons claimed infancy protection under Section 16 of the Act. Dismissing the claim the Court held that it is well established that an establishment not only connotes the persons in management and the owners of the business, but also connotes the assets of the business and employees who are employed in the business. So long as business continues as usual without any change either in the assets or in the employees who are involved in the business, the establishment should be taken to be continuing. The intention for earning exemption under Section 16(1)(b) is that a period of three years has not yet elapsed from the date of establishment of the factory in question. The partition and allotment of shares will merely result in reduction of liability for the payment of contribution as the individual shares are now owning less number of buses and consequently a lesser number of employees working under them. Except for that difference the business which is being carried on by each of the three sharers cannot be said to be new establishment because the old business never came to an end. If partition and allotment of shares in a business is to be taken as amounting to a closure of the old business, and starting of new establishment, in the hands of sharers, then the provisions of the Act may easily be defeated by bringing about a partition once in three years, thus depriving the employees of the benefits of the Act.

In *Visva Bharati* v. *Reg. P.F. Commissioner, W.B.*[3] it was held that the Visva Bharati University was constituted as a body corporate as a residential University, therefore, if the University as an establishment does not come under the provisions of the Act, the different branches or the department of the University cannot be brought within the mischief of the Act. The financial position of an establishment is not the only criterion which will entitle an establishment to an exemption under Section 16(2) of the Act. Other circumstances may also be considered.

In *Sayaji Mills Ltd.* v. *R.P.F. Commissioner*,[4] the question involved was whether a factory purchased in liquidation proceeding in 1954 and restarted in 1955 is entitled to exemption as an infant factory for a period of three years. The Supreme Court held that for ensuring exemption under Section 16(1)(b) of the Act it must be established that a period of three years has not yet elapsed from the date of its establishment. It has no reference to the date on which the employer, who is liable to make contribution acquired title to the factory. The Act also does not state that any kind of stoppage in the working of the factory would give rise to a fresh period of exemption. The work in a factory which is once established may be interrupted on account of factory holidays, strikes, lock-outs, temporary break down of machinery, periodic repairs, non-availability of raw materials, paucity of finance, etc. It may also be interrupted on account of an order of the Court. Interruption in the running of a factory which is governed by this Act, brought about by any of the aforesaid reasons, without more, cannot be construed as

1. AIR 1965 Mad 462.
2. (1968) 1 LLJ 534 (Mad).
3. (1983) 1 LLJ 382 (Calcutta).
4. (1985) 1 LLJ 238 (SC).

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resulting in the factory, ceasing to be a factory governed by the Act and its restarting cannot be held that a new factory is or has been established. On the resumption of manufacturing work in the factory it would continue to be governed by the Act. The Court also made it clear that mere investment of additional capital or effecting repairs to the existing machinery before it was restarted, the diversification of lines of production or change of ownership would not amount to the establishment of a new factory attracting exemption under Section 16(1)(b) of the Act for a fresh period of three years.

In *Gujchem Distillers India Ltd.* v. *Regional Provident Fund Commr.*,[1] the petitioner is a company which initially bore the name "Sardesai Brother Ltd.," and was ultimately changed to present name. The petitioner has its original factory at Valsad district which was started in 1939 and has been manufacturing Rectified Spirit and other products. In 1975 the Company started a new factory at the Industrial Estate, Ankaleshwar for the purpose of manufacturing Acetic Acid. The company obtained loans on concessional rates from different banking institutions earmarked only for this new unit at Ankaleshwar which is about 150 Kms. away from Balimora. New unit has its own staff. Both the units were running under separate licences. Account books and profit and loss accounts are maintained separately for both the units. But at a later stage they are consolidated in a form to be presented to the shareholders of the Company and to the Registrar of Companies and also for the purpose of income-tax. Employees of the two units were not transferable from one unit to the other. On these facts the petitioners claim that the Ankaleshwar unit is a new establishment entitled for exemption under Section 16(1)(b) of the Act. It was held that on overall consideration of the various factors the Ankaleshwar unit is a separate unit entitled to the infancy benefit under Section 16(1)(b). It was further pointed out that the term establishment is not defined in the Act and therefore, every case has to be decided on the conspectus of all relevant factors of the particular case. There can be no rigid formula or guideline because what is good in respect of one case may not be good in respect of another case. One or two factors by themselves may not be sufficient to any definite conclusion but on the overall consideration, if the Court finds that unit for all purposes is a distinct one, the only factor that it is run by a common employer, would hardly be of any consequence.

In *M/s. Conveyor Equipment Company (P) Ltd.* v. *The Union of India and another*,[2] a partnership firm was carrying on business as Technical Consultants and Designers in addition to fabrication and manufacture of structural and mechanical engineering products including conveyor bolts. The engineering division was closed and it confined its business to consultancy. The employees were paid closure compensation. Thereafter, engineering equipment was leased out to M/s. Conveyor Equipment (Pvt.) Ltd., who carried on the business of fabrication and manufactured structural and other engineering products after obtaining factory licence in their own name. The question is whether the lessee is entitled to infancy protection under Section 16(1)(b), of the Act. It was held that the lessee is entitled to the protection because the lease is of the site, building and the machinery and not of the establishment as a whole or as an outgoing concern. All the employees were paid closure compensation and the Labour Court on a reference under Section 10 of the Industrial Disputes Act has held that the closure was genuine and *bona fide*. Although the new establishment was started only after a short period of 16 days but once there is closure of the old establishment this interval of time between clousre of an establishment and opening of new establishment is immaterial. Mere lease of the land, building and machinery will not amount to lease of the business

1. (1986) 1 LLJ 19 (Guj).
2. (1986) 2 LLJ 22 (Mad).

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as well.

The question of infancy was also examined by the Bombay High Court in *Dharamsi Morarji Chemicals Co. Ltd.* v. *N.G. Desai, The R.P.F. Commissioner.*[1] In this case a factory situated at Ambarnath was engaged in manufacturing of organic chemicals and fertilizers. The management established another factory at Roha to manufacture other chemicals. The management transferred few experienced employees from the old factory to new. The Court was to determine whether old and new factories constituted a single establishment or not so as to entitle new factory to infancy protection. It was held that the two factories have separate registration rules, they are registered separately, maintaining separate profit and loss accounts, having separate works managers and plant superintendents, separate and independent set of employees who are not transferable from one factory to another. Not only this there was no supervisory control by one factory over the other, no connection between them in the matters of supervision, finance or managerial control. Thus the two factories constitute distinctly different entities and separate establishment.

The mere fact that the company ultimately consolidated the accounts of the two factories for the purposes of the Companies Act and the Income Tax Act can not make the two factories into one establishment. It is a well established fact that where one and the same company establishes separate and distinct factories at different places in the country with each having its separate accounts, consolidation is annually effected for the purpose of the Companies Act and the Income Tax Act. The new factory is entitled to infancy protection under Section 16(1)(b).

In *Bajaj Food Products* v. *Central Board of Trustee and others*,[2] a business concern K.C. Bajaj & Co. was dissolved and two of its partners started a new business in the same premises under a new name. After dissolution of the old firm, the machinery was disposed of, the employers were retrenched, benefits admissible under law were given to them and Sales Tax Registration number was surrendered. It was held that new establishment is not a continuation of the old one because except that the new business was started in the same premises, there was no connection between the business carried on by the dissolved firm and the business carried on by the new firm as they have raised their own capital from their own resources. Therefore the new firm was entitled to infancy protection under Section 16(1)(b) of the Act.

In *Regional P.F. Commissioner* v. *B. Rukmini K. Shetty*,[3] Mr. Bhat a lessee of the premises in question was running a restaurant. The possession of the said premises was delivered to the landlord in execution of a court decree. Thereafter the same premises were leased out to the present respondent who started a restaurant under the same name and style Hotel Shivaprasad afresh. The lessee Mrs. Shetty obtained bank loan for starting this restaurant with new furniture, utensils, obtaining licence from municipality and recruiting new employees but under the old name. It was held that it was a new establishment entitled to infancy protection under Section 16(1)(b) of the Act notwithstanding the fact that the name of the new establishment continued to be the same as the old establishment.

In *Aditya Syntheties Pvt. Ltd.* v. *Union of India & another*,[4] the petitioner company was considered as a branch of M/s. Aditya Mills Ltd. It was contested on the ground that the petitioner company was installed in Nagpur in March 1977. The two companies are separately registered under the Companies Act and their Directors are also neither common nor interested persons. It was held that the two are different establishments as

1. (1985) 1 LLJ 433 (Bom).
2. (1991) 1 Lab LJ 52 (Delhi).
3. (1992) Lab LJ 898 (Kerala).
4. (1994) 2 LLJ 76 (Raj).

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they are separately incorporated, each pays taxes separately, the nature of goods manufactured are different and they are owned by different companies. Simply because one company is manufacturing the goods for another, it cannot be held that it is a branch or department of the other. Therefore the petitioner company having been established in 1977 is entitled for infancy benefit.

In *M/s. Wipro Ltd., Tumkur* v. *Regional P.F. Commissioner, Karnataka*,[1] the petitioner is a company incorporated under the Companies Act with its registered Head Office at Bombay. The company established its unit Wipro Consumer Products at Tumkur in Karnataka and started production with effect from 13 April, 1988. The Company purchased all the plants, machinery and other assets including the premises of M/s. Margarine and Refined Oils Co. (P) Ltd. at Tumkur. An old used machinery was transferred to Tumkur from Company's unit at Amelnar and financial assistance for Rs. 2.42 crore was also given. The question was whether M/s. Wipro Ltd. Tumkur is a branch unit of Bombay establishment. The respondent in its order stated that the petitioner company is a juristic person which can always provide funds to individual unit from out of its own resources keeping at the same, the separate identity of each of the units. Secondly only because second hand machinery was transferred prom Amelnar unit to Tumkur we cannot draw a firm conclusion that the two are one and the same factory. Inspite of this the respondent treated both the units at Amelnar and at Tumkur as one. But the petitioner claimed the Tumkur unit as a new one and also claimed infancy protection under Section 16(1)(d). It was held that in the absence of functional integrality between the two units it is not possible to hold that Wipro Consumer Products Tumkur is a branch of Wipro Ltd., Bombay. The petitioner is entitled to claim infancy protection under Section 16(1)(d). It was further held that to determine whether different units of an employer constitute "one establishment" or "separate establishments" various tests such as unity of ownership, management and control, unity of ernployment, functional integrality and general unity of purpose will have to be applied. But it is not possible to lay down any one test as absolute and invariable test for all cases. It depends on facts and circurnstances of each case. If one unit can exist conveniently and reasonably without the other they are not one but separate units. The test of integrality or commonness is the basis to hold that several units of one employer is "one establishment".[2]

In *Metazinc Pvt. Ltd.* v. *R.M. Gandhi, R.P.F. Commissioner and others*,[3] the petitioner is a private limited company with its office at Vile Parle, Bombay. It has a factory at Bhiwandi which is engaged in the manufacture of Zinc Oxide. There was another subsidiary company of the petitioner at Patalganga manufacturing sulphuric acid and doing business in the name of Shree Siddheshwari Sulphur Products Pvt. Ltd. By virtue of an order of the High Court the two Companies were amalgamated. The Bhiwandi unit was covered by the Act since 1976. The question arose whether Act be applied to Patalganga unit as well. Petitioner's contention was that the two were distinct units and the Patalganga unit was entitled to claim infancy while the P.F. Commissioner treated the two units as one and was of the view that Patalganga unit was a branch or division of the Bhiwandi unit. It was held that except for the fact that the petitioner company was owning the two units and there was consolidation of their accounts, there was nothing which can be said to be indicative of the two units being a department or branch of each other. Holding that the two were distinct units and the Patalganga was entitled for infancy protection the court observed that one or two factors may not lead to any definite conclusion but the matter should be decided on overall considerations and the

1. (1995) 1 LLJ 120 (Karn).
2. *Ibid*
3. (1992) 2 Lab LJ 647 (Bom).

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fact that the units are run by a common employer would hardly be of any consequence.

Section 16(2) of the Act has been enacted to benefit such factories as may be suffering from financial losses. The Government may in appropriate cases grant temporary relief to such establishments by exempting them from the application of the Act. But the discretion vested in the Government is not to be exercised arbitrarily. Section 16(2) of the Act does not violate Article 14 or Article 19(1)(3) of the Constitution.[1]

It was held in *Annamma Iype* v. *Regional P.F. Commissioner*,[2] that merely because of temporary suspension of activities of an establishment, the employer cannot take the position that he is no longer liable to pay the administrative charges. Once there has been a real and *bona fide* division which disrupted the original establishment, and separate and distinct establishments are created as a result of partition, the liability cannot be saddled upon the allottees to pay the administrative charges as before.

Section 16-A. Authorising certain employers to maintain provident fund accounts.—(1) The Central Government may, on an application made to it in this behalf by the employer and the majority of employees in relation to an establishment employing one hundred or more persons, authorise the employer by an order in writing, to maintain a provident fund account in relation to the establishment, subject to such terms and conditions as may be specified in the Scheme :

Provided that no authorisation shall be made under this sub-section if the employer of such establishment had committed any default in the payment of provident fund contribution or had committed any other offence under this Act during the three years immediately preceding the date of such authorisation.

(2) Where an establishment is authorised to maintain a provident fund account under sub-section (1), the employer in relation to such establishment shall maintain such account, submit such return, deposit the contribution in such manner, provide for such facilities for inspection, pay such administrative charges, and abide by such terms and conditions, as may be specified in the Scheme.

(3) Any authorisation made under this section may be cancelled by the Central Government by order in writing if the employer fails to comply with any of the terms and conditions of the authorisation or where he commits any offence under any provision of this Act :

Provided that before cancelling the authorisation, the Central Government shall give the employer a reasonable opportunity of being heard.

Section 17. Power to exempt.—(1) Section 17 of the Act empowers the Appropriate Government to exempt whether prospectively or retrospectively any establishment from the operation of all or any of the provisions of any scheme. The exemption shall be granted by a notification in the Official Gazette and shall be subject to such conditions as may be specified in the said notification. Any establishment to which this Act applies may be exempted, if in the opinion of the Appropriate Government :

(a)(i) the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in Section 6 of the Act ; and

(ii) the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than benefits provided (i) under this Act, or (ii) any Scheme in relation to the employees in any other establishment of a similar character.

Any other establishment may also be exempted if :

1. *Bharat Board Mill Ltd.* v. *Regional Provident Fund Commissioner*, AIR 1957 Cal 702
2. (1993) 1 ELJ 973 (Kerala).

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(b)(i) the employees of such establishment are in enjoyment of benefits in the nature of Provident Fund, pension or gratuity ; and

(ii) the Appropriate Government is of the opinion that benefits separately or jointly are on the whole not less favourable to such employees than the benefit provided under this Act, or any Scheme in relation to employees in any other establishment of a similar character.

Provided that no such exemption shall be made except after consultation with the Central Board which on such consultation shall forward its views on exemption to the appropriate Government within such time limit as may be specified in the Scheme.

(1-A).—Where an exemption has been granted to an establishment under clause (a) of sub-section (1),—

(a) the provisions of Sections 6, 7-A, 8 and 14-B shall so far as may be, apply to the employer of the exempted establishment in addition to such other conditions as may be specified in the notification granting such exemption, and where such employer contravenes, or makes default in complying with any of the said provisions or conditions or any other provision of this Act, he shall be punishable under Section 14 as if the said establishment had not been exempted under the said clause (a) ;

(b) the employer shall establish a Board of Trustees for the administration of the provident fund consisting of such number of members as may be specified in the Scheme ;

(c) the terms and conditions of service of members of the Board of Trustees shall be such as may be specified in the Scheme ;

(d) the Board of Trustees constituted under clause (b) shall—

(i) maintain detailed accounts to show the contributions credited, withdrawals made and interest accrued in respect of each employee ;

(ii) submit such returns to the Regional Provident Fund Commissioner or any other officer as the Central Government may direct from time to time ;

(iii) invest the provident fund monies in accordance with the directions issued by the Central Government from time to time ;

(iv) transfer, where necessary, the provident fund account of any employee ; and

(v) perform such other duties as may be specified in the Scheme.

(1-B).—Where the Board of Trustees established under clause (b) of sub-section (1A) contravenes, or makes default in complying with, any provisions of clause (d) of that sub-section, the Trustees of the said Board shall be deemed to have committed an offence under sub-section (2A) of Section 14 and shall be punishable with the penalties provided in that sub-section.

(1-C).—The appropriate Government may, by notification in the Official Gazette, and subject to the condition on the pattern of investment of pension fund and such other conditions as may be specified therein, exempt any establishment or class of establishments from the operation of the Pension Scheme if the employees of such establishment or class of establishments are either members of any other pension scheme or propose to be members of such pension scheme, where the pensionary benefits are at par or more favourable than the Pension Scheme under this Act.

(2).—Sub-section (1) of Section 17 deals with the exemption in respect of an

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establishment and sub-section (2) deals with the exemption in respect of any person or class of persons employed in any establishment to which the Employees' Provident Fund Scheme applies. Any Scheme may make provision for exemption from the operation of all or any of the provisions of the Scheme, if :

(a) such person or class of persons is entitled to benefit in the nature of provident fund, gratuity, or old age pension ; and

(b) such benefits separately, or jointly are on the whole not less favourable than the benefits provided under this Act or the Scheme ; and

(c) in case of exemption to a class of persons the Appropriate Government is of opinion that the majority of persons constituting such class desire to continue to be entitled to such benefits.

(2-A).—The Central Provident Fund Commissioner may, if requested so to do by the employer, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt whether prospectively or retrospectively any establishment from the operation of all or any of the provisions of the Insurance Scheme, if he is satisfied that the employees of such establishment are, without making any separate contribution or payment of premium, in enjoyment of benefits in the nature of life insurance, whether linked to their deposit in provident fund or not and such benefits are more favourable to such employees than the benefits admissible under the Insurance Scheme.

In *Tmt. D. Rani & others* v. *The Management Indian Drugs and Pharmaceuticals Ltd.*[1] the Management which is a Government owned undertaking introduced "The Group Life Insurance, Scheme" in April, 1977. Prior to introduction of this Scheme the employees were also covered by the Deposit Linked Insurance Scheme framed under the Act in 1976. Seven employees died while in service. The management deducted the amount due under Deposit Linked Insurance Scheme from amount received from L.I.C. under Group Insurance Scheme. This action has been challenged by the petitioners. Exemption was granted under Section 17(2-A) in 1984 after the death of the employees and prior to that only a communication was received regarding exemption. It was held that a simple communication is not enough, instead for exemption under Section 17(2-A) publication of the exemption notification in Official Gazette is necessary. Therefore the employees were entitled to benefits under both the schemes for the period during which no exemption has been validly granted in favour of the management. The employer holds the amount received from the L.I.C. under the Group Insurance Scheme under trust and there was no justification to deduct any amount from the sum received under Group Insurance Scheme.

(2-B).—Without prejudice to the provisions of sub-section (2-A), the Insurance Scheme may provide for the exemption of any person or class of persons employed in any establishment and covered by the Scheme from the operation of all or any of the provisions thereof, if the benefits in the nature of life insurance admissible to such person or class of persons are more favourable than the benefits provided under the Insurance Scheme.

(3).—This sub-section deals with duties of an employer in respect of any person or class of persons employed in any establishment and exempted from operation of all or any of the provisions of any scheme whether such exemption has been granted to the establishment wherein such person or class of persons is employed or to the persons or class of persons as such. The employer in relation to such establishment :

(a) shall in relation to provident fund, pension and gratuity to which any such person or class of persons is entitled maintain such accounts and submit such

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1. (1991) 1 Lab LJ 62 (Madras).

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returns, make such investment, provide for such facilities for inspection and pay such inspection charges as the Central Government may direct.

(b) shall not, at any time after the exemption reduce the total quantum of benefits in the nature of pension, gratuity or provident fund to which any such person, or class of persons was entitled at the time of exemption. No such reduction is possible without the leave of the Central Government. That means the incapacity of employer to reduce the benefits can be overcome by the prior sanction of the Central Government.

(c) shall, where any person leaves his employment and is re-employed in another establishment to which this Act applies, transfer the amount of accumulation to the credit of that person in the provident fund of the establishment left by him to the credit of that person's account in the provident fund of the establishment in which he is re-employed or in the Fund established under the scheme applicable to the establishment, as the case may be. Such transfer has to be made within such time as may be specified in this behalf by the Central Government.

Where an application for exemption under Section 17 is made but it is not granted, the liability of the factory for payment of contribution shall be from the date the Scheme applied to the factory and not from the date on which the refusal of the Government to exempt was communicated to it.[1] It has been held by the Supreme Court in *B.T. Manufacturing Co.* v. *T.L. Association*[2] that the Employee's Provident Funds Act does not exclude the jurisdiction of the Industrial Courts to frame an additional scheme for gratuity. It is the minimum benefit to which an employee shall be under the scheme entitled to, but he may be afforded even higher benefits and there is no bar to it in the Act. Section 17 of the Act brings out two points very clearly. If the benefits provided by the employer are not less favourable than the statutory benefits to which the employee is entitled under the Act, he may apply for exemption and the appropriate Government may grant it. If benefits conferred by him are less favourable than the statutory benefits, he may not be entitled to an exemption, in which case both the benefits would be available to the employee. These provisions clearly indicate that the statutory benefits which in the opinion of the legislature are the minimum to which the employees are entitled, cannot create a bar against the employees' claim for additional benefits from their employers.[3]

(3-A).—Where in respect of any person or class of persons employed in any establishment, an exemption, is granted under sub-section (2-A) or sub-section (2-B) from the operation of all or any of the provisions of the Insurance Scheme (whether such exemption is granted to the establishment wherein such person or class of persons is employed or the person or class of persons as such), the employer in relation to such establishment—

(a) shall, in relation to the benefits in the nature of life insurance to which any such person or class of persons is entitled, or any insurance fund, maintain such accounts, submit such returns, make such investments, provide for such facilities for inspection and pay such inspection charges as the Central Government may direct ;

(b) shall not, at any time after the exemption without the leave of the Central Government, reduce the total quantum of benefit in the nature of life insurance to which any such person or class of persons was entitled immediately before the date of the exemption.

1. *L. Sen & Co.* v. *R.P.F. Commissioner*, AIR 1959 Pat 271.
2. AIR 1960 SC 833.
3. *Ibid.*

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(4). Cancellation of exemption.—Sub-section (4) of Section 17 provides for cancellation of any exemption granted under Section 17. Any exemption granted may be cancelled by the authority which granted it, by order in writing if an employer fails to comply :

(a) in the case of an exemption granted under sub-section (1), with any of the conditions imposed under that sub-section or sub-section (1-A) or with any of the provisions of sub-section (3) of Section 17 ;

(aa) in the case of an exemption granted under sub-section (1-C), with any of the conditions imposed under that sub-section ; and

(b) in the case of an exemption granted under sub-section (2), with any of the provisions of sub-section (3) of Section 17 of the Act ;

(c) in the case of an exemption granted under sub-section (2-A), with any of the conditions imposed under that sub-section or with any of the provisions of sub-section (3-A).

(d) in the case of an exemption granted under sub-section (2-B), with any of the provisions of sub-section (3-A).

The power of cancelling exemption granted under this section is confined to authority which grants it. The mere fact that power to grant exemption is subsequently made exercisable by different authority would entitle that authority, to cancel exemption which is already granted.[1]

(5).—Where any exemption granted under sub-section (1), sub-section (1-C), sub-section (2), sub-section (2-A) or sub-section (2-B) is cancelled, the amount of accumulations to the credit of every employee to whom such exemption applied, in the provident fund, pension fund or the Insurance Fund of the establishment in which he is employed together with any amount forfeited from employer's share of contribution to the credit of the employee who leaves the employment before the completion of the full period of service shall be transferred within such time and in such manner as may be specified in the Scheme, the Pension Scheme or the Insurance Scheme to the credit of his amount in the fund or the Pension Fund or the Insurance Fund as the case may be.

(6).—Subject to the provisions of sub-section (1-C) the employer of an exempted establishment or of an exempted employee of an establishment to which provisions of the Pension Scheme apply shall, notwithstanding an exemption granted under sub-section (1) or sub-section (2), pay to the Pension Fund such portion of the employer's contribution to its Provident Fund within such time and in such manner as may be specified in the Pension Scheme.

In *Indian Seamless Metal Tubes Ltd., Pune* v. *Union of India & others*,[2] the appellant sought exemption under Section 17 of the Act and relaxation under Clause 79 of the E.P. Fund Scheme. Relaxation was refused without recording reasons but exemption was granted under Section 17 of the Act. It was held that since no reason was given as to why exemption was not granted retrospectively and also why relaxation was not granted under Regulation 79, the levy of damages cannot be sustained. The respondent has the power to levy damages but while exercising its power in refusing grant of relaxation it must state the reasons.

Section 17-A. Transfer of Account.—Where an employee employed in an establishment to which this Act applies leaves his employment and obtains re-employment in another establishment to which this Act does not apply, the amount

1. *R.K.L. Gupta* v. *Ram Saha Lal*, (1970) 1 LLJ 390.
2. (1995) 1 LLJ 773 (Bom).

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of accumulations to the credit of such employee in the Fund or in the Provident Fund of the establishment left by him shall be transferred to the credit of his account in the Provident Fund of the establishment in which he is re-employed. Any such transfer shall be made only if the employee so desires and the rules in relation to the Provident Fund permit such transfer. Further the transfer shall be effected within such time as may be specified by the Central Government in this behalf.

Sub-section (2) enacts that where an employee employed in an establishment to which this Act does not apply leaves his employment and obtains re-employment in another establishment to which this Act applies, the amount of accumulations to the credit of such employee in the Provident Fund of the establishment left by him may be transferred to the credit of his account in the Fund or in the Provident Fund of the establishment in which he is re-employed. Any such transfer may be made only if the employee so desires and the rules in relation to the Provident Fund permit the transfer.

It is evident from the language of sub-sections (1) and (2) of Section 17-A that the transfer of Provident Fund accumulation under the former clause is mandatory if the conditions permitting the transfer are fulfilled. But under sub-section (2) the transfer is not obligatory but is merely directory and is conditioned by the terms of that sub-section.

Section 17-AA. Act to have effect notwithstanding anything contained in Act 31 of 1956.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Life Insurance Corporation Act, 1956.

Section 17-B. Liability in case of transfer of establishment.—Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under the provisions of this Act or the Scheme, the Family Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer :

Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

The facts, in *Sri Angappa Spinning Mills and others* v. *Regional Commissioner, Employees' Provident Fund, Tamil Nadu and Pondicherry*,[1] are that a firm was running a Mill over lands obtained on lease. It mortgaged the superstructure as well as the machinery in favour of the Bank. On account of the default committed in repayment, the Bank of Madurai instituted proceedings to enforce the mortgage and the sale of hypotheca. After obtaining preliminary and final decree the Bank filed execution petition for the sale of the hypotheca for the realisation of the amount due in Court auction sale. One Krishnamaraja purchased the hypotheca, but he could not take possession of the property since the firm filed application to set aside the sale. A receiver was appointed to take possession and lease out the hypotheca and the receiver leased out the same to another firm. Ultimately Krishnamaraja took possession and sold the property to Angappa Spinning Mills. This Mill took possession of the properties and also obtained renewal of the lease from the owner of the land. The Regional Provident Fund Commissioner claimed contribution from Krishnamaraja and the Angappa Spinning Mills in respect of persons employed by the judgment-debtor firm. Both disputed their liability. Finally an order was passed under Section 7-A of the Act concluding that both Krishnamaraja as well as Angappa Spinning Mills and its partners would all be jointly and severally liable to pay contribution. This order was challenged by both.

It was held that the transfer contemplated under Section 17-B of the Act is a

1. (1968) 1 L.L.J. 235 (Mad).

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transfer by the employer. The use of the words "where an employer transfers" clearly indicates that the action of transfer must be attributable or referable to the employer. Had it been otherwise the language used in the section would have been "where the establishment had been transferred". A Court sale takes place by operation of law and not by any transactions *inter vivos*. In that sense it is an involuntary sale against the wishes of the person whose property is sold. Transfer ordinarily connotes a voluntary transaction entered into between two parties. It is also settled that a purchaser at a Court sale is a transferee by operation of law. Therefore, a Court auction sale cannot be considered as a transfer by an employer of the establishment to the transferee. The words, "any other manner whatsoever" occurring in Section 17-B could not cover a case of involuntary sale or a Court sale. Consequently Section 17-B does not take within its fold involuntary sales.

Section 18. Protection of action taken in good faith.—No suit, prosecution or other legal proceedings shall lie against the Central Government, a State Government, the Presiding Officer of a Tribunal, any authority referred to in Section 7-A, an Inspector or any other person for anything which is in good faith done or intended to be done in pursuance of this Act, the Scheme, the Family Pension Scheme or the Insurance Scheme.

Whenever power is conferred upon executive officers to do some act that might infringe the rights of the parties or might inflict legal injuries upon parties, some sort of protection in the nature of an immunity for *bona fide* acts becomes necessay. But any such provision cannot be intended to oust the jurisdiction of the Civil Courts to declare that the inferior tribunal has acted in excess of jurisdiction.[1] Thus to invoke the aid of Section 18 two conditions are necessary :

(1) Any person claiming immunity must have acted in good faith.

(2) Any act done or intended to be done by him must be in pursuance of this Act, the Scheme, the Family Pension Scheme or the Insurance Scheme.

The expression 'good faith' is not defined in this Act. It has been defined in the Indian Penal Code and in the General Clauses Act apparently in different manners. But the essence of it has been maintained in both the enactments, Good faith means an act done honestly and with no lack of diligence, which an honest man of ordinary prudence in accustomed to exercise.[2]

Section 18-A. Presiding Officer and other officers to be public servants.—The Presiding Officer of a Tribunal, its officers and other employees, the authorities referred to in Section 7-A and every Inspector shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.

Section 19. Delegation of powers.—Section 19 of the Act permits delegation of power, authority of jurisdiction exercisable by Appropriate Government. Appropriate Government may be either Central Government or State Government. The Central Government may by order direct that any power, authority or jurisdiction exercisable by it under this Act, the Scheme, the Family Pension Scheme or the Insurance Scheme shall be exercisable,

(i) by the State Government ; or

(ii) by any officer or authority subordinate to the Central Government ; or

(iii) by such officer or authority subordinate to the State Government as may be specified in the notification.

But any such delegation by the Central Government shall be subject to the such conditions and in relation to only such matters as may be specified in the direction

1. *Madras Electric Supply Corporation Ltd.* v. *Industrial Tribunal*, 2 FJR 97.
2. *Harbhajan Singh* v. *State of Punjab*, AIR 1961 Punj 215.

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issued by the Government.

Similarly the State Government may also delegate its power, authority or jurisdiction exercisable by it under the Act or the Scheme to any officer or authority subordinate to it as may be specified in the notification. And any such delegation of power by the State Government shall be subject to such conditions and in relation to such matters as may be specified in the direction issued by the Government.

The State Government cannot delegate the power to the Regional Provident Fund Commissioner who is subordinate to the Central Government in the absence of any statutory provision authorising it to do so.[1]

Section 20. Power of Central Government to give directions.—The Central Government may, from time to time, give such directions to the Central Board as it may think fit for the efficient administration of this Act and when any such direction is given the Central Board shall comply with such direction.

Section 21. Power to make rules.—(1) The Central Government may, by notification in Official Gazette, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the salary and allowances and other terms and conditions of service of the Presiding Officer and the employees of a Tribunal ;

(b) the form and the manner in which, and the time within which, an appeal shall be filed before a Tribunal and the fees payable for filing such appeal ;

(c) the manner of certifying the copy of the certificate, to be forwarded to the Recovery Officer under sub-section (2) of Section 8-C ; and

(d) any other matter which has to be or may be, prescribed by rules under this Act.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Section 22. Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, as amended by the Employee's Provident Funds and Miscellaneous Provisions (Amendment) Act, 1988, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for the removal of the difficulty :

Provided that no such order shall be made after the expiry of a period of three years from the date on which the said amendment Act receives the assent of the President.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

The Bombay High Court is of the opinion that any doubt or difficulty experienced by the authorities who were charged with the administration of the provisions of the Act may be referred to the Central Government and the owner of an establishment cannot

1. *Popular Transports (Regd.) Madras* v. *Regional Provident Fund Commissioner, Madras*, (1970) 2 MLJ 491.

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move the Central Government.[1]

The employer can move the High Court under Article 226, of the Constitution, even before the Central Government had an opportunity to consider the matter. The employer shall have right to have the decision of the Central Government examined by the High Court if the decision is to turn on the interpretation of the Act itself.[2]

The enquiry to be conducted under this section being a fact finding enquiry, it is incumbent upon the Central Government to call for production of oral and documentary evidence both by the employer as also by the concerned department when disputed questions of fact arise for determination and thereafter decide as to how many are workmen or not.[3]

It is entirely the jurisdiction of the Central Government to decide the applicability of the Act to a particular case as also to decide whether an establishment falls within the definition of an establishment within Section 1(3)(b) barring the number of persons employed in an establishment.[4]

The order of the Central Government under this section is a *quasi* judicial order. The Central Government must state the reasons for making such order. However, the executive authority cannot like a Court of Law be expected to give detailed reasons. If the order of Government is a speaking order it is not bad.[5]

Where once a doubt has been raised and it has not been adjudicated by the Central Government, no further action can be taken by the authority to enforce the provisions of the Act.[6] But the absence of any decision by the Central Government under Section 19-A (now under this section), specially when that section is not resorted to by anyone, cannot deter the authorities from putting into operation the Scheme in respect of any establishment.[7]

In *Union of India* v. *Ogale Glass Works*,[8] the company was carrying on business of Manufacturing glasswares, stoves, lanterns and enamelwares. It has several sections in its factory. In 1946 it introduced a Provident Fund Scheme for its workers and was paying contributions. In November, 1952, the Employees' Provident Fund Act came into force and the company was paying contributions, although it raised an objection that only the employees in lantern and stove section were covered by the Scheme and that it was bound to make contributions, only in respect of those employees. After the decision of the Bombay High Court in *The Nagpur Glass Works Ltd.* v. *R.P.F. Commissioner*,[9] wherein it was held that the Act and the Scheme applied only to such sections (lantern and stove) of the company as were covered by Schedule I, the respondent company discontinued in making contributions in respect of employees other than those working in lantern and stove sections. The employees raised a dispute and there was an award directing contributions for the years 1952, 1957, 1958 and 1959 only. Meanwhile the decision of the Bombay High Court was reversed in the *R.P.F. Commissioner, Bombay* v. *Shree Krishna Metal Manufacturing*.[10] The department made a demand for a contribution from November, 1952 to December 1960. The company

1. *Central Hindustan Orange Cold Storage Co. Ltd.* v. *Prafulla Chandra Ram Chandra*, AIR 1967 Bom 126.
2. *Metro Motor Private Ltd.* v. *Reg. P.F. Commissioner, Punjab*, AIR 1959 Punj 89.
3. *The Poly Clinic Nagercoil* v. *Regional Commissioner, E.P.F. Tamil Nadu*, (1983) 1 LLJ 449 (Madras).
4. *Valluvar Handloom Textiles* v. *Government of India*, (1981) 1 LLJ 458.
5. *Wire Netting Stores* v. *R.P.F. Commissioner*, AIR 1970 Delhi 143.
6. *Dhanalakshmi Weaving Works* v. *R.P.F. Commissioner*, AIR 1963 Ker 219.
7. *Nazeena Traders (P) Ltd.* v. *R.P.F. Commissioner*, AIR 1965 AP 200.
8. AIR 1971 SC 2577.
9. (1958) 1 LLJ 281.
10. (1962) 1 LLJ 427.

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filed a writ petition on the ground that there has been a decision of the Central Government under Section 19-A of the Act to the effect that the Act and the Scheme applied only to lantern and stove sections, which was denied by the Union of India on the ground that the High Court has committed an error in construing the letters date 19.8.1959 as indicating that there has been a decision by the Central Government under Section 19-A. It was held that "the Act and the Scheme applies to all sections of the respondent in view of the fact that there has been no decision under Section 19-A under the two letters referred to above. It was only a limited decision not to apply the Act and the Scheme in view of the decision of the Bombay High Court till the disposal of the appeal by the Supreme Court".[1]

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1. *Union of India v. Ogale Glass Works*, AIR 1971 SC 2577.

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THE MINIMUM WAGES ACT, 1948

CHAPTER I
PRELIMINARY

Object of the Act.—The Minimum Wages Act was passed for the welfare of labourers. This Act has been enacted to secure the welfare of the workers in a competitive market by providing for a minimum limit of wages in certain employments.[1] The statement of object of Bill points out :

> "The justification for statutory fixation of minimum wages is obvious. Such provisions which exist in more advanced countries are even necessary in India, where workers' organisations are yet poorly developed and the workers's bargain-power is consequently poor".

The Act provides for fixation by the Central Government of minimum wages for employments detailed in the Schedule of the Act and carried on by or under the authority of the Central Government, by a railway administrative or in relation to a mine, oilfield or majorport, or any corporation established by a Central Act, and by the State Government for other employments covered by the Schedule of the Act.

The items in the Schedule are those where sweated labour is most prevalent or where there is a big chance of exploitation of labour. More categories of employment can be added under this Act. The object of the Act is directed against exploitation of the ignorant, less organised and less privileged members of the society by the capitalists. The anxiety of the State for improving the general economic condition of some of its less favoured members appears to be in supersession of the old principle of absolute freedom of contract and the doctrine of *laissez faire* and in recognition of the new principles of social welfare and common good.[2] The object of this Act is to prevent exploitation of the workers and for this purpose, it aims at fixation of minimum wages which employer must pay.[3] The legislature undoubtedly intended to apply the Act to those industries or localities in which, by reason of causes such as unorganised labour or absence of machinery for regulation of wages, the wages paid to workers were in the light of the general level of wages and subsistence level inadequate.[4] Like other branches of labour legislation the security of industrial peace and efficiency may be kept in view when giving effect to the provisions of this Act.

In a developing country like ours which faces the problem of unemployment on a very large scale it is not unlikely that labour may offer to work even on starvation wages. The policy of the Act, therefore, is to prevent employment of sweated labour in the general interest and, so, in prescribing the minimum wages rates, the capacity of the employer need not be considered as the State assumes that every employer must pay the minimum wages for the employee's labour.[5]

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1. *See* Preamble of the Act.
2. *Y.A. Mamarde* v. *Authority under M.W. Act*, AIR 1972 SC 1721.
3. *Edward Mills Co. Ltd., Beawar* v. *State of Ajmer*, (1954) 2 LLJ 686.
4. *M/s. Bhikua Yamasa Kshatriya* v. *Sangamner Akola Taluka Bidi Kamgar Union*, AIR 1963 SC 806.
5. *Crown Aluminium Works* v. *Their Workmen*, AIR 1958 SC 30.

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The Act contemplates that minimum wages rates must ensure not only the mere physical need of the worker which would keep him just above starvation but must ensure for him not only his subsistence and that of his family but also preserve his efficiency as a workman.[1] It should, therefore, provide not merely for the bare subsistence of his life but the preservation of the workers and so must provide for some measure of educational, medical requirements and amenities.[2]

Constitutional Validity of the Act.—A Draft Convention on the question of minimum wages was adopted at the International Labour Conference held in Geneva in 1928. Draft Convention contemplated the creation of a minimum wage fixation machinery only in the case of "Traders or parts of Trades (and in particular in home working trades) in which no arrangements exist for the effective regulation of wages by collective agreement otherwise and wages are exceptionally low".

In view of the Directive Principles of State Policy as contained in Article 43 of our Constitution it is beyond doubt that the securing of living wages to labourers which ensures not only bare physical subsistence but also the maintenance of health and decency, is conducive to the general interest of the public. The Minimum Wages Act was passed to fulfil the aspiration as contained in the following resolution :—

"If the labourers are to be secured the enjoyment of minimum wages and they are to be protected against exploitation by their employers, it is absolutely necessary that restraints should be imposed upon their freedom of contract and such restriction cannot in any sense be said to be unreasonable. On the other hand, the employers cannot be heard to complain if they are compelled to any minimum wages to their labourers even though the labourers on account of their poverty and helplessness, are willing to work on lesser wages".

The constitutional validity of the Act is attacked on the ground that it violates the guarantee of freedom of trade or business etc., envisaged by Article 19(1)(g) of the Constitution inasmuch as the provisions of the Act are bound to affect harshly and even oppressively a particular class of employers who for purely economic reasons are unable to pay the minimum rate of wages fixed by the authorities, but have absolutely no dishonest intention of exploiting their workers.

The fact that employer might find it difficult to carry on business on settled principle[3] cannot be a sufficient reason for striking down the law itself as unreasonable. The poverty of labourers is also a factor to be taken into consideration while determining the question whether a particular provision is in the interest of the general public.

The appropriate Government has undoubtedly been given very wide powers with regard to the procedure for fixing of minimum wages. But it has to take into consideration, before fixing of wages, the advice of the committee, if one was appointed, or the representations on its proposals made by persons who are likely to be affected by it. Consultations with advisory bodies have been made obligatory on all occasions of revision of minimum wages. The provisions in the Act constitute adequate safeguard against any hasty, arbitrary or capricious decision by the appropriate Government. However, there is no provision regarding review of the decision of the 'appropriate Government' but that by itself cannot be taken to hold the provisions of the Act as unreasonable.[4] Therefore, the restrictions, though they interfered to some extent with the freedom of trade or business guaranteed under Article 19(1)(g) of the

1. *Hydro (Engineers) P. Ltd.* v. *Workmen*, AIR 1969 SC 182.
2. *Ibid.*
3. *Ibid.*
4. *Abanindra Nath Ghosh* v. *State of Kerala*, AIR 1963 SC 13.

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Constitution, are reasonable and imposed in the interest of the general public and as such are protected by Article 19(6) of the Constitution.[1]

Salient features of the Act.—Some of the features are :—

(1) This Act provides for the fixation of : (a) minimum time rate of wages ; (b) a minimum piece rate ; (c) a guaranteed time rate ; and (d) an overtime rate, for different occupations, localities or classes of work and for adults, adolescents, children and apprentices.

(2) The minimum rate of wages under the Act may consist of : (a) a basic rate of wages and a cost of living allowance ; or (b) basic rate of wages with or without the cost of living allowance and the cash value of the concessions in respect of essential commodities supplied at concessional rates ; or (c) an all-inclusive rate.

(3) The Act requires that wages shall be paid in cash, although it empowers the appropriate Government to authorise the payment of minimum wages, either wholly or partly in kind in particular cases.

(4) It lays down that the cost of living allowance and the cash value of concessions in respect of supplies of essential commodities at concessional rates shall be computed by the competent authority at certain interval. In case of undertakings controlled by the Union Territories and the Central Goverment, the Director, Labour Bureau is the competent authority.

(5) The Act empowers the appropriate Government to fix the number of hours of work per day, to provide for a weekly holiday and the payment of overtime wages in regard to any Scheduled employment in respect of which minimum rates of wages have been fixed under the Act.

(6) The establishments covered by this Act are required to maintain registers and records in the prescribed manner ;

(7) The Act also provides for appointment of Inspectors and authorities to hear and decide claims arising out of payment of wages at less than the minimum rates of wages or remuneration for days of rest or of work done on such days or of overtime wages.

(8) The provision is also made in the Act for dealing with complaints made for violation of the provisions of the Act and for imposing penalties for offences committed under the Act.

Section 1. Application of the Act.—The Minimum Wages Act, 1948 extends to the whole of India. It applies to the employments which are enumerated in the Schedule of the Act and in certain cases may, in the discretion of the appropriate Government, be extended to any other employment.

Section 2. Interpretation

(a) **"Adolescent"** means a person who has completed his fourteenth year of age but has not completed his eighteenth year.

(aa) **"Adult"** means a person who has completed his eighteenth year of age.

(b) **"Appropriate Government"** means—

(i) in relation to any Scheduled employment carried on by or under the authority of the Central Government or a railway administration or in relation to a mine, oil-field or major port, or any corporation established by a Central Act, the Central Government, and

(ii) in relation to any other Scheduled employment, the State Government.

In *Regional Labour Commissioner, Bangalore and others v. T.K. Varkey and Co.*

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1. *Bijay Cotton Mills Ltd. v. State of Ajmer*, AIR 1955 SC 33.

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and another[1] some workers were employed by the contractor in construction of staff quarters for Railways. The workers were being paid minimum wages at the rates prescribed by the State Government, whereas the Labour Enforcement Officer's view was that they should have been paid the rates prescribed by the Central Government. A claim for the difference between the two rates was made which has been contested. It was held that the place where the employment is carried on and for whose benefit the employment is carried on and under whose control the work connected with the employment is carried on are the deciding factors in finding out whether the appropriate Government is the Central Government or State Government. In the instant case, the employment has taken place in the place belonging to the Railways and the employment or the work carried on was for the purpose of construction of staff quarters for the benefit of the Railways. The work was being carried on by or under the authority of the Railways only. The fact that the contractor had employed the workmen was not a deciding factor because actually the work was carried on by or under the authority of Railways only. Therefore, the Central Government is the appropriate Government and the minimum wages shall be payable in accordance with the notification issued by the Central Government.

(bb) "child" means a person who has not completed his fourteenth year of age.

(c) "Competent authority" means the authority appointed by the appropriate Government by notification in the official Gazette to ascertain from time to time the cost of living index number applicable to the employees employed in the Scheduled employments specified in such notification.

(d) "Cost of living index number" in relation to employees in any Scheduled employment in respect of which minimum rates of wages have been fixed means the index number ascertained and declared by the Competent authority by notification in the Official Gazette to be the cost of living index number applicable to employees in such employment.

(e) "Employer" means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person one or more employees in any Scheduled employment in respect of which minimum rates of wages have been fixed under this Act.

Employer includes except in sub-section (3) of Section 26—

(i) in a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act any person named under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948, as manager of the factory ;

(ii) in any scheduled employment under the control of any Government in India in respect of which minimum rates of wages have been fixed under this Act, the person or authority appointed by such Government for supervision and control of employees or where no person or authority is so appointed, the Head of the Department ;

(iii) in any Scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act, the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the chief executive officer of the local authority ;

(iv) in any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person responsible to the owner for the supervision and control of the

1. (1992) 1 Lab LJ 547 (Karnataka).

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employees or for the payment of wages.

A managing agent is an employer. Private engineering contractor engaged on Government contract or work is an employer of the drivers of the lorries which are hired out to him with drivers at agreed rates.[1]

(f) "Prescribed" means prescribed by rules made under this Act.

(g) "Scheduled employment" means an employment specified in the schedule, or any process or branch of work forming part of such employment.

The following are scheduled employment as provided in the Schedule. The Schedule is divided in two parts.

PART I

(1) Employment in any woollen carpet making or shawl weaving establishment.

(2) Employment in any rice mill, flour mill or dal mill.

(3) Employment in any tobacco (including bidi making) manufactory.

(4) Employment in any plantation, that is to say, any estate which is maintained for the purpose of growing cinchona, rubber, tea or coffee.

(5) Employment in any oil mill.

(6) Employment under any local authority.

(7) Employment on the construction or maintenance of roads or in building operations.

(8) Employment in stone breaking or stone crushing. It covers the breaking or the crushing of stones incidental to the mining operation, but the stone breaking or stone crushing operations which are carried on in mines are not included.[2] The minimum wages fixed for the employment of stone breaking and stone crushing will not apply to the operation of quarrying 'Sahabad State'.[3]

(9) Employment in any lac manufactory.

(10) Employment in any mica works.

(11) Employment in public Motor Transport.

(12) Employment in tanneries and leather manufactory.

PART II

Employment in agriculture, that is to say, any form of farming including the cultivation and tillage of the soil, dairy farming, the production, cultivation growing and harvesting of any agriculture or horticulture commodity, the raising of live-stock, bees or poultry, and any practice performed by a farmer or on a farm as incidental to or in conjunction with farm operation (including any forestry or timbering operations and the preparation for market and delivery to storage or to market or to carriage for transportation to market of farm produce).

In *Chatturam Darsanram* v. *Union of India*,[4] a petition for quashing the notification dated 28th May, 1976 issued by the Central Government revising the minimum wages of the workmen employed in the mica mines was filed. The question was whether workmen working in mine were working in scheduled employment.

It was held that item No. 10 of Part I of the Schedule relates to employment in any 'mica works' and not 'mica mines'. The connotations of 'mica mines' and 'mica works' are different. It would not be reasonable to read 'mica mines' in the expression

1. *Krishna Ayer* v. *Superintending Engineer, P.W.D. Madras*, AIR 1949 Mad 427.
2. *Madhya Pradesh Mineral Industry Association, Nagpur* v. *The Regional Labour Commissioner*, AIR 1960 SC 1068.
3. *Labour Inspector, Hyderabad* v. *C.S.O. Co.*, AIR 1973 SC 1177.
4. (1980) 2 LLJ 465 (Pat).

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'mica works'. Thus 'mica mines' is not included in the Schedule and as the inclusion of an employment in the Schedule is a condition precedent for issuing any notification by the appropriate Government the notification fixing minimum wages is *ultra vires*.

In *Ahmedabad Panjrapole Sanstha* v. *Miscellaneous Mazdoor Sabha and others*,[1] the petitioner Sanstha is engaged in the activity of taking care for sick and lame cattle and to maintain them. The Sanstha has other objects such as raising of cattle improving the breed, caring for the cattle, to run a dairy farm in order to supply good milk and ghee in the interest of public and to grow grass to cut it or have it cut and to buy or sell the same. It has lands in different villages and it earns rental and other income and also agricultural income besides income earned by sale of wood, wool, manure etc. It has its branch at Vastrapur where cattle are put for treatment. It was held that having regard to the activities of the Panjrapole Sanstha, it is a 'commercial establishment' attracting Minimum Wages Act. The Vastrapur branch of Sanstha is not a separate establishment and the fact that the other branches have not demanded minimum wage will not affect the right of the workmen.

(h) "Wages".—'Wages' means all remuneration, capable of being expressed in terms of money, which would if the terms of the contract of employment, express or implied, were fulfilled, be payable to person employed in respect of his employment or of work done in such employment and includes house rent allowance.

Wages do not include :

(i) the value of—

(a) any house accommodation, supply of light, water, medical attendance ; or

(b) any other amenity or any service excluded by general or special order of the appropriate Government ;

(ii) any contribution paid by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance ;

(iii) any travelling allowance or the value of any travelling concession.
Where a trip allowance was prescribed by a notification, the notification was held to be invalid because trip allowance is meant to compensate the extra cost which an employee is likely to incur when he moves out of his headquarter in connection with his employment ; it clearly partakes of the character of travelling allowance and travelling allowance according to the definition of the expression "wages" cannot form a component of the wages.[2]

(iv) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment ; or

(v) any gratuity payable on discharge.

(i) "Employee" means any person who is employed for hire or reward to do any work, skilled, or unskilled, manual or electrical in a scheduled employment in respect of which minimum rates of wages have been fixed. It includes :

(1) an out-worker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adopted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person.

(2) An employee declared to be an employee by the appropriate Government.

1. (1987) 2 Lab LJ 291 (Guj).
2. *Mahendra Chandra* v. *State*, AIR 1971 Tri 32.

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It does not include any member of the Armed Forces of the Union. The definition of employee in this Act is wide enough to include a person working on job basis or piece work.

Wage-Structure.—Broadly speaking the wage structure can be divided into three categories—The basic 'minimum wage' which provides bare subsistence and is at poverty line-level, a little above is the 'fair wage' and finally the 'living wage' which comes at a comfort level. It is not possible to demarcate these levels of wage structure with any precision.

Certain principles on which wages are fixed have been stated by the Supreme Court in *Kamani Metals and Alloys* v. *Their Workmen*.[1]

> "Broadly speaking the first principle is that there is a minimum wage which, in any event must be paid, irrespective of the extent of profits, the financial condition of the establishment or the availability of workmen on lower wages. This minimum wage is independent of the kind of industry and applies to all alike big or small. It sets the lowest limit below which wages cannot be allowed to sink in all humanity. The second principle is that wages must be fair, that is to say, sufficiently high to provide a standard family with food, shelter, clothing, medical care and education of children appropriate for the workmen but not at a rate exceeding his wage earning capacity in the class of establishment to which he belongs. A fair wages is thus related to the earning capacity and the workload. It must, however, be realised that "fair wage" is not "living wage" by which is meant a wage which is sufficient to provide not only the essential above mentioned but a fair measure of frugal comfort with an ability to provide for old age and evil days. Fair wage lies between minimum wage, which must be paid in any event, and the living wage, which is the goal".

Minimum Wages.—The expression "minimum wages" is not defined in the Act presumably because it would not be possible to lay down a uniform minimum wages for all industries throughout the country on account of different and varying conditions prevailing from industry to industry and from one part of the country to another.[2] It was held in *Hydro (Engineers) Private Ltd.* v. *The Workmen*,[3] that :—

> "The concept of minimum wages takes in the factor of the prevailing cost of essential commodities whenever such minimum wage is to be fixed. The idea of fixing such wages in the light of cost of living at a particular juncture of time and neutralising the rising prices of essential commodities by linking up scales of minimum wages with the cost of living index cannot, therefore, be said to be alien to the concept of minimum wage. Furthermore in the light of spiralling of prices in recent years, if the wage scales are to be realistic it may become necessary to fix them so as to neutralise at least partly the price rise in essential commodities".

Components of a minimum wage.—A minimum wage must provide not merely for the bare subsistence of life but for the preservation of the efficiency of the worker, and, so it must also provide for some measure of education, medical requirements and amenities. The concept of minimum wage does not mean a wage that enables the worker to cover his bare physical need and keep himself just above starvation. The capacity of the employer to pay is irrelevant in fixing minimum wage. Therefore, no addition shall be made to the components of the minimum wage, which would take the minimum wage near the lower level of the fair wage. In *Unichay* v. *State of Kerala*,[4] it was held that "the Act contemplates that minimum wage rates should be fixed in the scheduled

1. AIR 1967 SC 1175.
2. *Hydro (Engineers) Pvt. Ltd.* v. *The Workmen*, AIR 1969 SC 182.
3. AIR 1969 SC 182.
4. AIR 1962 SC 12.

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industries with the dual object of providing subsistence and maintenance of the worker and his family and preserving his efficiency as a worker".

The Tripartite Committee of the Indian Labour Conference (1957) accepted the following five norms for the fixing of 'minimum wage' :—

(i) In calculating the minimum wage, the standard working class family should be taken to consist of 3 consumption units for one earner ; the earnings of workmen, children and adolescents should be disregarded.

(ii) Minimum food requirement should be calculated on the basis of a net intake of calories, as recommended by Dr. Aykroyd for an average Indian adult of moderate activity.

(iii) Clothing requirements should be estimated at per capita consumption of 18 yards per annum which would give for the average workers family of four, a total of 72 yards.

(iv) In respect of housing, the rent corresponding to the minimum area provided for under Government Industrial Housing Scheme should be taken into consideration in fixing the minimum wage.

(v) Fuel, lighting and other 'miscellaneous' items of expenditure should constitute 20% of the total minimum wage.

It was held in *Workmen of Reptakos Brett & Co. Ltd.* v. *Management*,[1] that a worker's wage is no longer a contract between an employer and an employee. It has the force of collective bargaining under the labour laws. Each category of the wage structure has to be tested at the anvil of social justice which is the live-fibre of our society today. Keeping in view the socio-economic aspect of the wage structure one more component to minimum wage should be added, namely, children education, medical requirement, minimum recreation including festivals/ceremonies and provision for old age, marriages, etc. should further constitute 25% of the total minimum wage.

It was further held that the wage structure which approximately answers the above six components is nothing more than a minimum wage at subsistence level. The employees are entitled to the minimum wage at all times and under all circumstances. An employer who cannot pay the minimum wage has no right to engage labour and no justification to run the industry.

In *People's Union for Democratic Rights* v. *Union of India*,[2] it was held by the Supreme Court that where children below the age of 14 years are employed in violation of the Employment of Children Act, 1938 and minimum wages are denied either to such children or to other persons who by reason of poverty or socially or economically disadvantageous position are unable to approach the Court, legal redress may be sought on their behalf by any member of public.

Fair wages.—There is difference between minimum wages and fair wages. In case of fair wage, besides the principle of industry-cum-region, the company's capacity to bear the financial burden must receive due consideration. But mere hopeful observations made in the director's annual report cannot be basis for awarding increased wages because such observations are sometimes made to inspire hope and confidence in shareholders and they cannot be a substitute for actual audited figures.[3]

S.A.F.L. Works v. *State Industrial Court, Nagpur*,[4] is a leading case on the point. In this case the Supreme Court observed that in fixing the paying capacity the Tribunal will have to fix the income as well as permitted deductions and allowances properly

1. (1992) 1 Lab LJ 340 (SC).
2. (1992) 2 LJ 545 (SC).
3. *Sangam Press* v. *Workmen*, AIR 1975 SC 2035.
4. AIR 1978 SC 1113.

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incurred. There can be no dispute that expenses incurred for purchase of raw material, maintenance of the factory, expenses incurred towards rent, public charges, maintenance of the establishment and expenses incurred in marketing of the produce should be deducted. These items are not exhaustive. As to whether a particular item of expenditure is liable to be deducted or not have to be determined on the facts of the case. No deduction should be allowed for payment of income tax or for allowances made for depreciation or for making provision for reserve. So far as expenses incurred towards payment of wage bill inclusive of dearness allowances, bonus, gratuity, etc. are concerned they will have to be deducted. After properly determining the paying capacity of the industry the Tribunal will have to proceed to fix fair wages which would include the fitment, scale of wages and dearness allowance. While after fixing the above the Tribunal will have to determine as to from which date retrospective effect will have to be given for payment of the wages thus fixed. As the paying capacity will have to be re-determined the wage including fitment, scale of wages, dearness allowance, period during which retrospective effect is to be given will have to be determined afresh.

It was held in *Transport Corpn. of India Ltd.* v. *State of Maharashtra & others*,[1] that it is not for the Labour Court or Tribunal to fix the minimum rates of wages. While fixing fair rates of wages the courts or tribunals take into consideration the minimum rates of wages and where the Government has not fixed the minimum rates of wages then the courts or tribunals ascertain for themselves what would be the minimum rate of wages. In fact minimum rate of wages are fixed by the Government. Courts or tribunals merely ascertain what are the minimum rates of wages for the purpose of deciding 'fair wages'.

Living wage.—The Fair Wage Committee in its report published by Government of India, Ministry of Labour in 1949 defined the 'living wage' as under :

> "The living wage should enable the male earner to provide for himself and his family not merely the bare essentials of food, clothing and shelter but a measure of frugal comfort including education for children, protection against ill-health, requirements of essential social needs, and a measure of insurance against the more important misfortunes including old age".

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1. (1993) 2 LLJ 365 (Bom).

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CHAPTER II
FIXATION OF MINIMUM RATES OF WAGES, WORKING HOURS AND DETERMINATION OF WAGES AND CLAIMS ETC.

Section 3. Fixation of minimum rates of wages.—Section 3 lays down that the appropriate Government shall be empowered to fix the minimum rates of wages in the manner prescribed under this Act. It shall fix the minimum rates of wages payable to employees employed in an employment specified in Part I or Part II of the Schedule and in an employment added to either part by notification under Section 27.

But the appropriate Government may, in respect of employees employed in an employment specified in Part II of the Schedule, instead of fixing minimum rates of wages under this clause for the whole State, fix such rates for a part of the State or for any specified class or classes of such employment in the whole of the State or part thereof.

The appropriate Government shall review the minimum rates of wages to fix and revise the minimum rates, if necessary, at such intervals as it may think fit. The intervals as aforesaid shall not exceed five years. But where for any reason the appropriate Government has not reviewed the minimum rates of wages fixed by it within an interval of five years, the appropriate Government shall not be without power to review or revise after five years. Until the minimum rates are so revised the minimum rates in force immediately before the expiry of the said period of five years shall continue in force.

Sub-section (1-A) provides that the appropriate Government may refrain from fixing minimum rates of wages in respect of any scheduled employment in which there are in the whole State less than one thousand employees engaged in such employment. But if at any time, the appropriate Government comes to a finding after such enquiry as it may make or cause to be made in this behalf that the number of employees in any scheduled employment in respect of which it has refrained from fixing minimum rates of wages, has risen to one thousand or more. It shall fix minimum rates of wages payable to employee in such employment as soon as may be after such finding.

In *Sahdeo Sahu* v. *State of M.P. and another*,[1] it was held that Section 3(1-A) does not prevent the appropriate Government from fixing the minimum rates of wages even if the number of employees in that scheduled employment is less than one thousand. The word 'refrain' used in Section 3(1-A) would include jurisdiction to withdraw the minimum rates of wages earlier fixed if the strength in the scheduled employment falls below 1000. The power to rescind the wages once fixed without any express provision in that regard in Section 3(1-A) can well be inferred with reference to Section 21 of the General Clauses Act.

Sub-section (2) provides that the Government may fix—

(a) a minimum rate of wages for time work (*i.e.*, "a minimum time rate") ;

(b) a minimum rate of wages for piece work (*i.e.*, "a minimum piece rate") ; When a piece rate is fixed, every worker will not earn the same amount for the day. If the difference is due to reasons which are purely personal to the worker, no grievance can be made, but if the difference is brought about by

1. (1990) 2 Lab LJ 402 (MP).

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furnishing one with an appreciable advantage over the other as for example providing one with a machinery and the other with a hand mallet, there may be a possibility of injustice and an attempt must be made for arriving at a result which may really be reasonable and just in the circumstances.[1]

(c) a minimum of remuneration to apply in the case of employees employed on piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis which is known as "a guaranteed time rate". Clause (c) of Section 3(2) is intended to meet a situation where operation of minimum piece rate fixed by Government may result in worker earning less than minimum wage.[2]

(d) a minimum rate (whether a time rate or a piece rate) to apply in substitution for the minimum rate which would otherwise be applicable, in respect of overtime work done by employees which is known as "overtime".

The minimum rates of wages shall not apply in the following cases during the period in which the proceeding is pending and the award made therein is in operation or where the notification is issued during the period of operation of an award during that period :

(i) where in respect of an industrial dispute relating to the rates of wages payable to any of the employees employed in a scheduled employment any proceeding is pending before a Tribunal or National Tribunal under the Industrial Disputes Act, 1947, or before any like authority ; or

(ii) where an award made by any such authority as aforesaid is in operation ; and

(iii) a notification fixing or revising the minimum rates of wages in respect of the scheduled employment is issued during the pendency of such proceeding or the operation of the award.

Where such proceeding or award relates to the rates of wages payable to all the employees in the scheduled employment no minimum rates of wages shall be fixed or revised in respect of that employment during the said period.

In fixing or revising minimum rates of wages under Section 3 :

(a) different minimum rates of wages may be fixed for—

(i) different scheduled employments ;

(ii) different classes of work in the same scheduled employment ;

(iii) adults, adolescents, children and apprentices ;

(iv) different localities ;

(b) minimum rates of wages may be fixed by one or more of the following wage periods, namely :—

(i) by the hour, (ii) by the day, (iii) by the month, or (iv) by such other longer wage-period as may be prescribed.

Where such rates are fixed by the day or by the month, the manner of calculating wages for a month or for a day, as the case may be, may be indicated. Where any wage-period have been fixed under Section 4 of the Payment of Wages Act, 1936, minimum wages shall be fixed in accordance therewith.

In *Mr. Hassan Jan* v. *State of Bihar*,[3] the question for determination was whether in the absence of a rule framed under the Minimum Wages Act, a notification issued by the State Government prescribing a wage period of one year was valid. It was held that Rule 21 provides that the wage period with respect to any scheduled employment for

1. *M.G.A. Pai & Sons* v. *State*, AIR 1971 Mys 46.
2. *Hyderabad Engineering Pvt. Ltd.* v. *Workmen*, AIR 1969 SC 182.
3. (1980) 2 LLJ 358 (Pat).

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which wage has been fixed shall not exceed one month. Therefore a wage period of more than one month may be enforced only after the rules to that effect are made and published in the Gazette.

Fixing of different rates of minimum wages for different industries or in different localities by dividing State into different several zones will be in conformity with Section (3) or the scheme of the Act.[1] This Act purports to prevent exploitation of labour. For that purpose the appropriate Government is authorised to take steps to prescribe minimum rates of wages in the scheduled industries. This Act prescribes minimum wage rates which a welfare State assumes every employer must pay before he employs labour.[2] The minimum rates of wages are fixed with the dual object of providing sustenance and maintenance of the worker and his family and preserving his efficiency as a worker.[3] However, the minimum prescribed is not the economic or industrial minimum but contains several components which take the statutorily prescribed minimum near the level of the fair wage, and when that is the effect of the statutory provision capacity to pay may, no doubt, have to be considered.[4]

An Industrial Tribunal adjudicating a dispute relating to wages payable to the employees in a scheduled employment is not bound by the fixation of minimum rates of wages by the Government under Section 3 during the pendency of the proceedings.[5] The capacity of the industry to pay is not a relevant consideration when the rates of minimum wages as distinguished from fair wages are being fixed by the Industrial Tribunal.[6]

In *S.F.A.L. Works* v. *State Industrial Court, Nagpur*,[7] it was held that in fixing the minimum rate of wages, the Act also makes a provision for special allowance to be paid along with the basic rates of wages. The allowance is fixed by the Government to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers. So far as provisions under this Act relating to the minimum wages and special allowance are concerned they are fixed without any reference to the paying capacity of the employer, but when a dearness allowance is fixed as a part of the fair wage it will have to depend upon the paying capacity of the employer. It has been held that though the dearness allowance is given to compensate for the rise of cost of living, cent per cent neutralisation is not given as it may tend to inflation.

In *Jyothi Home Industries* v. *State of Karnataka*,[8] the question for consideration was whether the appropriate Government can fix guaranteed remuneration under this Act, for the day on which the employer is unable to give work. It was held that the appropriate Government under Section 3 can fix minimum wages for hours actually worked by the employee and if he is not in a position to fulfil his part of the contract on account of the facts that the employer does not offer him the necessary raw material to work on his job he would be entitled to remuneration under Section 3(2)(c). This view is supported by the other provisions like Sections 13 and 20 of the Act also. Thus the Government can fix guaratneed remuneration.

Section 4. Minimum rates of wages.—Section 4 provides that any minimum rates of wages fixed or revised by the appropriate Government in respect of scheduled employment under Section 3 may consist of—

1. *Chandra Bhawan Boarding and Lodging, Bangalore* v. *State of Mysore*, AIR 1970 SC 204.
2. *Crown Aluminium Works* v. *Their Workmen*, AIR 1958 SC 30.
3. *U. Unichay* v. *State of Kerala*, AIR 1969 SC 12.
4. *Ibid.*
5. *J.P. Industries* v. *Workmen*, AIR 1972 SC 605.
6. *Ibid.*
7. AIR 1978 SC 1113.
8. (1983) 1 LLJ 201 (Karnataka).

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(i) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct, to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers (which is known as the cost of living allowance) ; or

(ii) a basic rate of wages with or without the cost of living allowance and the cash value of the concession in respect of supplies of essential commodities at concession rates, where so authorised ; or

(iii) an all-inclusive rate allowing for the basic rate, the cost of living allowance and the cash of the concessions, if any.

The cost of living allowance and cash value of the concession in repsect of supplies of essential commodities at concessional rate shall be computed by the competent authority at such intervals and in accordance with such direction as may be specified or given by the appropriate Government.

The special allowance mentioned in Section 4(1) of the Act, is a variable amount forming part of the wages, being linked with the cost of living index number. The phrase 'a special allowance' does not take within its ambit the "trip allowance". This allowance is specifically referred to in Section 4(1) as "cost of living allowance". Therefore "trip allowance" and "cost of living allowance" fall in different categories for the former has not much to do with the prevailing cost of living index number.[1]

In *Karnataka Film Chamber of Commerce* v. *State of Karnataka*,[2] it was held that the language of Section 4 does not lend itself to the interpretation that a minimum wage under Section 4(1) necessarily should consist of basic wages and dearness allowance. Minimum wages may consist of a basic rate of wages and a special allowance at a rate adjusted at such intervals and in such manner as the appropriate Government may direct to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers, or a basic rate of wages with or without cost of living allowance and the cash value of the concessions in respect of suplies of essential commodities at concessional rates, where so authorised, or all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any. Therefore minimum wage may consist of basic wages and a special allowance to be adjusted with variations with increase or decrease in basic wages when question of neutralisation of cost of living arises by payment of dearness allowance. Further the question of payment of dearness allowance would arise only if basic wages fixed falls short of the minimum wage which the State Government has to fix taking into consideration the needs of the workers family consisting of three consumption unit. The statutory minimum wage does not measure up either to the fair wage or to the living wage. Therefore the Court cannot interfere with notification issued under the Minimum Wages Act unless the grounds are substantial.

In *Jaswant Rai Beri* v. *State of Punjab*,[3] it was held that, "Where an inclusive rate has been fixed including a basic rate of wages and cost of living allowance, this is in accordance with law. Whether the rate is fixed under clause (ii) or (iii), the fixation of an all-inclusive rate of minimum wages is legal. Under clause (ii), direction of adjustment at certain intervals is not necessary".

The phrase "double the ordinary rate of wages" means double the remuneration which an employee in fact ordinarily receives including the casual requisites and other advantages.[4] It does not mean double the rate of minimum wages fixed under the Act.

1. *Mahendra Chandra* v. *State*, AIR 1971 Tri 32.
2. (1987) 1 Lab LJ 182 (Karn).
3. AIR 1958 Punjab 405.
4. *V.A. Mashruwala* v. *Authority under M.W. Act*, AIR 1972 SC 1721.

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The word "ordinary" reflects the actuality rather than the worker's minimum entitlement under the Act.[1]

Irrelevant considerations in fixation of minimum wages.—The following considerations are not relevant in fixation of wages :—

(a) the fact that an employer may find it difficult to carry on his business on the basis of minimum wages ;[2]

(b) the financial capacity of the employee *i.e.*, his capacity to pay ;[3]

(c) the fact of the employer-company having incurred losses during the previous years ;

(d) employer's difficulties in importing raw materials ; and

(e) the region-cum-industry principles.

However in fixing fair wages the financial capacity of the employer and the wages scale prevailing in the comparable industries in the region are some of the relevant considerations.[4] Minimum wages must be paid irrespective of the extent of profits, the financial condition of the establishment or the availability of workmen, on lower wages.[5] The minimum wages is independent of the kind of industry and applies to all alike, big or small. It sets the lowest limit below which wages cannot be allowed to sink in all humanity.

Section 5. Procedure for fixing and revising minimum wages.—Section 5 lays down that in fixing minimum rates of wages in respect of any scheduled employment for the first time under this Act or in revising minimum rates of wages so fixed, the appropriate Government shall either :—

(a) appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision, as the case may be ; or

(b) by notification in the Official Gazette, publish its proposals for the information of persons likely to be affected thereby and specify a date not less than two months from the date of the notification on which the proposals will be taken into consideration.

After considering the advice of the committees appointed, and all representations received by it before the date specified in the Gazette notification, the appropriate Government may by notification in the official Gazette, fix or revise the minimum rates of wages in respect of each scheduled employment, which shall come into force after the expiry of 3 months unless otherwise provided in the notification.

Where the appropriate Government proposes to revise the minimum rates of wages by the mode specified in Section 5(1)(b), the appropriate Government shall consult the Advisory Board also.

If the Advisory Board approves the notification regarding revision of wages without discussing the objections raised, the action of the Board would be arbitrary because it amounts to non-application of mind in granting approval.[6]

The exercise of power to fix or revise the minimum wages under sub-section (2) of Section 5 is limited only to employments specified in the schedule. Under Section 27 of the Act the appropriate Government may add any employment to the schedule. The nature and extent of powers of the appropriate Government under Section 27 and

1. *Y.A. Mamarde* v. *Authority under M.W. Act*, AIR 1972 SC 1721.
2. *Hydro (Engineers) Pvt. Ltd.* v. *The Workmen*, AIR 1969 SC 182.
3. *Sangam Press* v. *Workmen*, AIR 1969 SC 2035.
4. *Hydro (Engineers) Pvt. Ltd.* v. *The Workmen*, AIR 1969 SC 182.
5. *Kamani Metals and Alloys Ltd.* v. *Workmen*, AIR 1967 SC 1175.
6. *H.B. Verma* v. *Union of India*, (1993) 1 LLJ 39 (Delhi).

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Section 5(2) is separate and distinct and what can be done by the appropriate Government in exercise of its power under Section 27 cannot be done by it in exercise of its powers under Section 5(2) of the Act.[1]

The power conferred upon the appropriate Government under Section 5(1) is neither arbitrary nor unguided. Therefore sub-section (1) does not offend Article 14 of the Constitution.[2] In the matter of fixing minimum wages, the economic capacity of the trade or industry is irrelevant, for, what alone is germane, is, the wage required by the employees to survive.[3] The fixation of minimum wages depends on the prevailing economic conditions, the cost of living in a place, the nature of the work to be performed and the conditions in which the work is performed. Where a notification is issued by the Government authorising the employer to deduct the sum mentioned in the notification towards the cost of free meals supplied to the workers by him, it was held that the notification gives only an option to the employer and does not impose an obligation upon him.[4] Supplying food is an amenity. The notification does not mean fixing of minimum wages in kind. The power of the Government to prescribe minimum rates of wages or to revise them does not include power to vary other terms of contract.[5]

In was held in *Ministry of Labour and Rehabilitation and another* v. *Tiffin's Barytes Asbestos & Paints Ltd.*,[6] that the notification fixing minimum wages cannot be lightly interfered with in exercise of writ jurisdiction by the High Courts on the ground of some irregularities in the constitution of the committee or the procedure adopted by the committee. Committee acts only as a recommendatory body, and minimum wages are fixed only by the Government. In a country where wages are already minimal a notification fixing minimum wages should not be interfered with under Article 226 of the Constitution of India except on the most substantial grounds. Action taken pursuant to a social welfare legislation to further the Directive Principles of State policy cannot be struck down on mere techanicalities.

In *Muruga Home Industries* v. *Government of Tamilnadu & another*[7] minimum wages of Beedi-workers were revised by the State Government by a notification issued after consultation with the Advisory Board. It was held that the notification fixing minimum wages should not be interfered with in writ proceedings except on most substantial grounds. Advisory Board is well balanced since representation is given to employers and employees. Work in Beedi industry is unorganised sector and condition of work and wages of beedi-workers are below subsistence level and minimum wages fixed is fair and just and not arbitrary.

In *Mahendra Chandra* v. *State*[8] the Government by a notification concerning motor transport employees fixed number of hours of work for normal working at 9 hours. The working hours fixed by the Government were in excess of the hours prescribed by Section 13 of the Motor Transport Workers Act, 1961. The notification was held as invalid. It was further held that the expression "and unless such notification otherwise provides" in Section 5(2) of the Act can at best be said to be "fairly capable of either interpretation" and so it has to be construed as prospective in nature because

1. *Madhya Pradesh Mineral Industrial Association* v. *The Regional Labour Commissioner*, AIR 1950 SC 1068.
2. *Chandra Bhawan Boarding and Lodging, Bangalore* v. *State of Mysore*, AIR 1970 SC 2042.
3. *Arbunda Bhuvan Tea Shop & others* v. *State of Maharashtra & others*, (1992) 1 Lab LJ 807 (Bom).
4. *Chandra Bhawan Boarding and Lodging, Bangalore* v. *State of Mysore*, AIR 1970 SC 2042.
5. *Bidi Leaves and Tobacco Merchants Association, Gondia* v. *State of Bombay*, AIR 1962 SC 486.
6. (1985) 2 Lab LJ 412 (SC).
7. (1996) 1 LLJ 598 (Madras).
8. AIR 1971 HP 32.

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the notification issued in terms of Section 5(2) would prejudicially affect vested rights, the legality of past transactions and impair contracts. Obviously if the notification is given retrospective effect it will supersede the term of the contract relating to wages and in consequence would reopen the question of wages already paid and settled.

By a notification of the year 1951, minimum wages in respect of unskilled labours of Nagpur Corporation was fixed. By a subsequent notification of the year 1956 revised rates of minimum wages were fixed but the word "unskilled labour" was not mentioned in the latter notification. It was held that "the second notification did not apply to all categories of labour. It had to be read in the background of earlier notification. Hence it must also be confined to unskilled labours".[1]

Section 7. Advisory Board.—The appropriate Government shall according to Section 7 appoint an Advisory Board for the purpose of—

(a) co-ordinating the work of committees and sub-committees, appointed under Section 5 ; and

(b) advising the appropriate Government in the matter of fixing and revising minimum rates of wages.

Besides the Advisory Board may devise the procedure to be adopted for discharging its functions under Section 5 of the Act.[2]

Section 8. Central Advisory Board.—Section 8 makes it obligatory upon the Central Government to appoint a Central Advisory Board for the following purposes :

(i) advising the Central and State Governments in the matters of the fixation and revision of minimum rates of wages and other matters under the Act ; and

(ii) for co-ordinating the work of the Advisory Boards.

Section 8(2) provides that the Central Advisory Board shall consist of :—

(i) persons to be nominated by the Central Government representing employers and employees in the scheduled employment who shall be equal in number ; and

(ii) independent persons not exceeding one-third of its total number of members.

The Chairman of the Central Board shall be one of the independent persons and shall be appointed by the Central Goverment.

Section 9. Composition of committees etc.—Section 9 provides that such of the committee, sub-committees and the Advisory Board shall consist of persons to be nominated by the appropriate Government. Persons who can be appointed to these committees shall be representatives of the employers and employees in the scheduled employments and shall be equal in number. Independent persons not exceeding one-third of the total number of members in such bodies shall also be appointed. The appropriate Government shall appoint one of such independent persons to be the Chairman.

The expression 'independent person' in this section means a person other than those who are employer and employees in relation to the scheduled employment in respect of which minimum wages are sought to be fixed.[3] The fact that the person nominated to function as independent member in the committee is a Government official, is no bar to such nomination.[4] It does not mean that persons in the employment of Government were to be excluded. The presence of high Government officials who

1. *Y.A. Mamade* v. *Authority under M.W. Act*, AIR 1972 SC 1721.
2. *Gulam Ahmad* v. *State of Bombay*, AIR 1962 Bom 97.
3. *D. Salt Works* v. *State*, AIR 1971 Guj 14.
4. *State of Rajasthan* v. *Hari Ram*, AIR 1976 SC 277 ; *Bengal Motion Pictures Employees' Union* v. *Kohinoor Picture Private Ltd.*, AIR 1964 Cal 519 ; *State of A.P.* v. *N.V. Beedi Mfg. Factory*, AIR 1973 SC 1307.

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may have actual working knowledge about the problems of employers and employees can afford a good deal of guidance and assistance in formulating the advice which is to be tendered under Section 9 to the appropriate Government.[1] The appointment of a Labour Commissioner as a Chairman who is conversant with the employment conditions and representing independent interest is valid.[2]

Section 9 does not require that the representative of employees should actually be employees in the employment in question, nor does it require that a person who has experience or knowledge in one capacity or another of the problems of employees in a particular industry, cannot represent those employees for the purpose of nomination under Section 9.[3]

No procedure has been prescribed in the Act as to the method which is to be adopted by the Advisory Board before making its recommendations to the State Government. It can devise its own procedure and collect some informations by appointment of a sub-committee consisting only of some of its members. But the Advisory Board has no power to appoint a rival sub-committee to the one appointed by the Government and take in such sub-committee persons who are not members of the Board.[4] But the report of the Advisory Board will not be vitiated only because such a sub-committee has been appointed. The irregularity committed by the Advisory Board in taking into consideration the report of the sub-committee was not such as to nullify either its recommendation contained in its report or the final decision of the Government taken on the basis of recommendation of the committee.[5]

In *Ministry of Labour and Rehabilitation and another* v. *Tiffin's Barytes Asbestos & Paints Ltd.*[6] on the basis of recommendation of a committee appointed by the Government of India the minimum rates of wages of certain categories of employees in the scheduled employment in Barytes, Bauxite, Manganese and Gypsum Mines were fixed by Government by issuing necessary notification. The notification was challenged on the ground that the committee was improperly constituted for the employees of Labour Department appointed to the committee are not 'independent persons' and the representatives of employees are not engaged for profit in the particular employment. The Supreme Court held the constitution of committee as valid on the ground that where Government is not the employer the Government employees who are entrusted with the task of implementation of the minimum wages do not for that reason alone become "interested persons" and cease to be "independent persons". As for the representatives of employers are concerned it is not necessary that the person appointed on the committee to represent, the employers in a scheduled employment should be engaged for profit in the particular employment. It is enough if a nexus exist between such representative and the employment or if such members are intimately connected and are aware of the particular schedule employment.

In *Sri Ram & Co.* v. *State of Tamil Nadu*,[7] the Government issued a notifiction fixing minimum wages of the employees of a rice mill in Tirupur. The notification was issued on the recommendation of a committee. One representative of the employer was a member of this committee but he was not given notice about the committee meetings. The question was whether non-issue of notice of meeting to one of the members would vitiate the notification issued by the Government. No notice was issued to personnel

1. *State of A.P.* v. *N.V. Beedi Mfg. Factory*, AIR 1973 SC 1307.
2. *Jaswant Rai Beri* v. *State of Punjab*, AIR 1958 Punj 425.
3. *D. Salt Works* v. *State*, AIR 1971 Guj 14.
4. *State of Rajasthan* v. *Hari Ram*, AIR 1976 SC 277.
5. *Ibid.*
6. (1983) 2 Lab LJ 412 (SC).
7. (1979) 2 LLJ 418 (Mad).

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officer of the Century Flour Mills Ltd. on account of the Chairman's misapprehension that the person who had earlier resigned was by name a member of the committee and in his place the mill had to substitute another. It was held that this misapprehension cannot obliterate the fact that one of the representatives of the employer was not given an opportunity to participate in the meetings. The notification was bad because the committee was not properly constituted and did not function in accordance with Section 9 of the Act. Further, the legislature has attached importance to the equality of representation to the employers and employees in the Advisory Committee, when that equality is not available and the balance sought to be maintained by the Legislature is disturbed, that will constitute a disregard of Section 9.

Section 10. Correction of errors.—The appropriate Government may at any time, by notification in the official Gazette, correct clerical or arithmetical mistakes in any order fixing or revising minimum rates of wages under this Act or error arising therein from any accidental slip or omission. Every such notification shall as soon as may be after it is issued be placed before the Advisory Board for inforamtion.

Section 11. Wages in kind.—The minimum wages payable under this Act shall be paid in cash. Where it has been the custom to pay wages wholly or partly in kinds, the appropriate Government being of the opinion that it is necessary in the circumstances of the case may, by notification in the official Gazette, authorise the payment of minimum wages either wholly or partly in kind.

If the appropriate Government is of the opinion that provisions should be made for the supply of essential commodities at concessional rates, it may by notification in the official Gazette, authorise the provision of such supplies at concessional rates. The cash value of wages in kind and of concessions in respect of supplies of essential commodities at concessional rates shall be estimated in the prescribed manner.

Section 12. Payment of minimum rates of wages.—Section 12 lays down that where in respect of any scheduled employment a notification under Section 5 is in force, the employer shall pay to every employee engaged in a scheduled employment under him, wages at a rate not less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deductions except as may be authorised within such time and subject to such conditions as may be prescribed. Provisions of Section 12 of this Act should not affect the provisions of the Payment of Wages Act, 1936.

Section 13. Fixing hours of normal working day, etc.—Section 13(1) provides that, in regard to any scheduled employment minimum rates of wages in respect of which have been fixed under this Act, the appropriate Government may—

(a) fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals ;

(b) provide for day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such day of rest ;

(c) provide for payment for work on a day of at a rest not less than the overtime rate.

According to Section 13(2) the provisions of sub-section (1) shall, in relation to the following classes of employees apply only to such extent and subject to such conditions as may be prescribed :—

(a) employees engaged on urgent work, or in any emergency which could not have been foreseen or prevented ;

(b) employees engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for

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the general working in the employment concerned ;

(c) employees whose employment is essentially intermittent ;

(d) employees engaged in any work which for technical reasons has to be completed before the duty is over ;

(e) employees engaged in a work which could not be carried on except at times dependent on the irregular action of natural forces.

Employment of an employee is essentially intermittent when it is declared to be so by the appropriate Government on the ground that the daily hours of duty of the employee, or if there be no daily hours of duty as such for the employee, the hours of duty, normally include periods of inaction during which the employee may be on duty but is not called upon to display either physical activity or sustained attention.

Section 14. Overtime.—Where an employee works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him overtime. An employee entitled to overtime must be such whose minimum rate of wage is fixed under this Act by the hour, by the day or by such a longer wage period as may be prescribed. The overtime shall be payable for every hour or for part of an hour so worked in excess at the rate fixed under this Act or under any law of the appropriate Government for the time being in force, whichever is higher.

Nothing in this Act shall prejudice the operation of the provisions of Section 59 of the Factories Act, 1948, in any case where those provisions are applicable.

Rule 25 of Madhya Pradesh Minimum Wages Rules provides for payment of overtime at "double the ordinary rates of wages". In *Y.A. Mamarde* v. *Authority under M.W. Act*,[1] a question arose whether the phrase 'ordinary rate' used in the said rule means double the remuneration which a workman in fact ordinarily receives or double the rate of minimum wages fixed for him under the Act. It has been held that the "minimum rates of wages for overtime work need not be confined to double the minimum wages fixed by the Act, but may justly be fixed at double the wages ordinarily received by the workmen as a fact".

It was held in *Municipal Council, Hatta* v. *Bhagat Singh*,[2] that section of the Minimum Wages Act clearly provides for payment of overtime only to those employees who are getting minimum rate of wages under the Minimum Wages Act, 1948. It does not apply to those getting better wages in other statutory rules. In the present case Municipal Council employees were receiving wages under Municipal Rules which were much more than minimum wages. Therefore, they are not entitled to benefit of Section 14 (i.e. overtime) merely because employment under any Local Authority is listed as Item 6 in the Schedule to the Act.

Section 15. Wages of worker who works for less than normal working day.—Section 15 provides, if an employee whose minimum rate of wages has been fixed under this Act by the day works on any day on which he was employed for a period less than the requisite number of hours constituting a normal working day, he shall be entitled to receive wages for a full normal working day unless :—

(i) the failure to work is cuased by his unwillingness to work and not by the omission of the employer to provide him with work, and

(ii) in such other case and circumstances as may be prescribed.

Section 16. Wages for two or more classes of work.—According to Section 16 where an employee does two or more classes of work to each of which a different minimum rate of wages is applicable, the employer shall pay to such employee in respect of the time respectively occupied in each such class of work, wages at not less than the minimum rate in force in respect of each such class.

Section 17. Minimum time-rate wages of piece work.—Where an employee is employed on piece work for which minimum time rate and not a minimum piece rate has been fixed under this Act, the employer shall pay to such employee wages at not less than

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1. AIR 1972 SC 1721.
2. AIR 1998 SC 1201.

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the minimum time rate. A bare reading of this section shows that piece rated workers are also governed by the provisions of this Act. This section requires the employer to pay piece rated workmen wages at not less than the minimum time rate. Thus there is no escape from the conclusion that piece rated workman is entitled to minimum rate of wages.[1]

Section 18. Maintenance of registers and records.—Section 18 requires that every employer shall maintain such registers and records giving such particulars of employees employed by him, the work performed by them, the wages paid to them, the receipts given by them and such other particulars and in such form as may be prescribed.

Every employer shall keep exhibited, in such manner as may be prescribed, in the factory, workshop or place where the employees in the scheduled employment may be employed or in the case of out workers, in such factory, workshop or place as may be used for giving out-worker to them, notice in the prescribed form containing prescribed particulars.

Under Section 18(3) the appropriate Government may, by rules made under this Act, provide for the issue of wage books or wages slips to employees employed in any scheduled employment in respect of which minimum rates of wages have been fixed. The appropriate Government may prescribe the manner in which entries shall be made and authenticated in such wage books or wages slips by the employer, or his agent.

Section 19. Inspectors.—Section 19 of the Act authorises the appropriate Government to appoint by notification in the official Gazette such persons as it thinks fit to be Inspectors for the purposes of this Act. The appropriate Government shall also define the local limits within which the Inspectors shall exercise their functions.

Powers of Inspectors.—The exercise of power by the Inspector under Section 19(2) is made subject to any rules made in this behalf. The powers of the Inspector are as follows :—

(a) He may enter, at all reasonable hours, any premises or place where employees are employed or work is given out to out-workers in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, for the purpose of examining any register, record of wages or notices required to be kept or exhibited by or under this Act or Rules made thereunder and require the production thereof for inspection. The inspector may also enter the premises etc., with such assistants, being person in the service of the Government or any local or other public authority, as he thinks fit.

(b) He may examine any person whom he finds in any such premises or an employee to whom work is given out therein.

(c) He may require any person given outwork and any out-workers to give any information, which is in his power to give, with respect of the names and addresses of the person to, for and from whom the work is given out or received, and with respect to the payments to be made for the work.

(d) He may seize or take copies of such register, record of wages or notice or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by an employer.

(e) He may exercise such other powers as may be prescribed.

Every Inspector shall be deemed to be public servant within the meaning of the Indian Penal Code. Section 19(4) lays down that any person required to produce any document or thing or to give any information by an Inspector shall be deemed to be legally bound to do so within the meaning of Section 175 and Section 176 of the Indian Penal Code. Revenue officers appointed as Inspectors are under the administrative control of Commissioner and Collector and they have no powers to give relief under

1. *Somiben Mathurabai Vasava* v. *M/s. Lalji Hakku Parmer Leather Works Co.*, (1984) 2 LLJ 381 (Guj).

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Section 20(2) but have large powers of supervision and control under Section 19.[1]

Section 20. Claims.—Section 20(1) empowers the appropriate Government to appoint, by notification in the official Gazette, an Authority to hear and decide for any specified area the following claims :

(i) any claims arising out of payment of less than the minimum rates of wages ; or

(ii) any claim in respect of the payment of remuneration for days of rest ; or

(iii) any claim in respect of payment of remuneration for work done on such days under clause (b) or (c) or Section 13(1) ; or

(iv) any claim of wages at the overtime rate under Section 14, or employees employed or paid in that area.

In *Anand Oil Industries* v. *Labour Court, Hyderabad*,[2] it was held that Section 20(1) of the Act does not cover all claims in respect of minimum wages ; it covers only cases where there is a dispute as to the rate at which the minimum wages are payable. When there is no dispute as to the rate of wages, but the dispute is as to the quantum of wages to which a workman is entitled, it would not be a matter falling under Section 20(1) of the Act and consequently a petition under Section 33-C (2) of the Industrial Disputes Act could not be held barred.

Who can be appointed as authority.—The following may be appointed as an Authority to decide any claims as aforesaid :

(a) any Commissioner for Workmen's Compensation ; or

(b) any officer of Central Government exercising functions as a Labour Commissioner for any region ; or

(c) any officer of the State Government not below the rank of a Labour Commissioner ; or

(d) any other officer with experience as a Judge of a Civil Court or as Stipendiary Magistrate.

The expression "other officer with experience as a judge of a Civil Court" means that the officer should be working or should have worked as presiding judge of a Civil Court. He need not be appointed by name but by office only.[3]

Who can apply.—Sub-section (2) provides that where an employee has any claim as referred to in Section 20(1) the following may apply to the Authority for a direction :—

(a) the employee himself ; or

(b) any legal practitioner authorised in writing to act on his behalf ; or

(c) any official of a registered Trade Union authorised in writing to act on behalf of the employee ; or

(d) any Inspector ; or

(e) any person acting with the permission of the Authority.

The Minimum Wages Act cuts across the contract between the employer and the employee. Any employee who feels aggrieved by the refusal of the employer to pay the minimum wages fixed under the Act has the right to make a complaint either by himself or through the prescribed agents to the Authority mentioned in the Act.

In the *Manager, Warrangal Branch, A.P. State Handloom Weavers Co-op. Society, Warrangal* v. *The Authority under Minimum Wages Act, Warrangal and others*,[4] an

1. *Sarpanch Gram Panchayat* v. *Ramgiri*, AIR 1958 SC 222.
2. AIR 1979 AP 182.
3. *The Malabari Tea Estate* v. *Sri Bhudhin Munda*, AIR 1950 Tripura 16.
4. (1986) I LLJ 353 (AP).

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application was filed by one Krishnamurthy representing 68 workmen, claiming minimum wages as per the order of the Government of Andhra Pradesh under Section 20(2) of this Act. The application was not signed by individual employee. The management raised objections regarding maintainability of the application as well as on merits. It was held that it is the duty of the Authority to examine and consider himself whether the application was properly filed or not. It is not necessary that the objection regarding maintainability should be raised by some one. If an application is not filed by himself it can be filed by a legal practitioner or any official of a registered trade union authorised in writing to act on behalf of the employee. It was, therefore, for the Authority to find out whether Krishnamurthy was an official of the union which was registered and he was authorised to represent them in writing. Further the Authority must satisfy himself that the application was in conformity with the requirements of Section 20(2) of the Act. The condition precedent to maintainability of an application under Section 20(2) is that the employee should have a claim for payment. In the absence of specific claim for compensation the Authority cannot arrogate to himself the duty of awarding compensation to protect the interest of workmen. In this case the application was neither maintainable nor there was a substantial claim.

Application for claims.—The application for any claim shall be presented within 6 months from the date on which the minimum wages or other amount become payable. But any application may be admitted after six months if the applicant satisfies the Authority that he had sufficient cause for not making the application within the prescribed period. The exercise of power for the condonation of delay is not controlled by the period of limitation prescribed by the Limitation Act for a suit and the Authority functioning under the Minimum Wages Act has, in its discretion, plenary power to condone the delay in presentation of a claim.[1] The finding of the Authority functioning under the Act as to the existence of sufficient cause for condonation of delay, is a finding of fact, and the High Court or the Supreme Court cannot interfere with it.[2] It was held in *Sarpanch Gram Panchayat* v. *Ramgiri*[3] that the discretion vested in the Authority to condone the delay, like other judicial discretion, must be exercised with vigilance and circumpection according to justice, common sense and sound judgment. The word "sufficient cause" should receive liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the applicant.

Procedure for deciding claims.—Sub-section (3) provides that when any application for claim is entertained, the Authority shall hear the applicant and the employer or give them an opportunity of being heard, and after such further inquiry, if any, as it may consider necessary, may without prejudice to any other penalty to which the employee may be liable under this Act, direct—

(i) in the case of a claim arising out of payment of less than the minimum rates of wages, the payment to the employee of the amount by which the minimum wages payable to him exceed the amount actually paid together with the payment of such compensation as the Authority may think fit. In no case any payment so directed should exceed ten times the amount of such excess as stated above ;

(ii) in any other case, the payment of the amount due to the employee, together with payment of such compensation as the Authority may think fit, but not exceeding ten rupees ; and

(iii) payment of such compensation in cases where the excess of the amount due

1. *Chief Officer, Town Municipal Council* v. *Chandra Dattatraya Patil*, AIR 1969 Mys 202.
2. *Ibid.*
3. AIR 1968 SC 222.

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is paid by the employer to the employee before the disposal of the application.

Under Section 20(3) the Authority has to hear the applicant and the employer or give them an opportunity of being heard. The Authority could straight away give a direction as regards the alleged non-payment of the minimum rates of wages and such compensation as it thinks fit not exceeding ten times the amount of excess of the minimum wages over that which was paid. Though Section 20(3) provides for further inquiry but this has to be at the discretion of the Authority. The nature and scope of inquiry would depend on the exact controversy raised in the case.[1] What the employee has to ask under Section 20(3) is the payment of difference and it is for the Authority to find out the difference and to order its payment.[2]

In *Priya Darsan Agarbatti* v. *State of M.P. & others*,[3] the award passed under the Industrial Disputes Act was to remain in operation till October 22, 1986. Minimum wages were not paid to the employee by the petitioner employer. It was held that Section 20(3)(i) of the Minimum Wages Act enables the Labour Court to direct payment to employees of the amount by which the minimum wages payable to him exceed the amount actually paid together with the payment of such compensation as the Authority may think fit, not exceeding ten times the amount of such excess. Although the matter of compensation is entirely within the discretion of the Labour Court, the discretion has to be exercised on consideration of the entirety of the facts and circumstances. In this case the petitioners were under the belief that minimum wages would not be payable either till October 22, 1986 or till the expiry of two months from the date of notice of intention. Therefore the compensation awarded was reduced to half by the High Court.

Powers of the Authority.—Section 20(4) lays down that if the Authority hearing any application under this section is satisfied that it was either malicious or vexatious, it may direct that a penalty not exceeding fifty rupees be paid to the employer by the person presenting the application.

Recovery of amount under order of Authority.—According to Section 20(5) any amount directed to be paid by the Authority may be recovered—

(a) if the Authority is a Magistrate, by the Authority as if it were a fine imposed by the Authority as a Magistrate ; or

(b) if the Authority is not a Magistrate, by any Magistrate to whom the Authority makes application in this behalf, as if it were a fine imposed by such Magistrate.

In view of Section 20(6) every direction of the authority under this section shall be final. This merely means that the decision of the Authority cannot be questioned under any provision of the Act. It does not exclude the jurisdiction of the Civil Court when the challenge is as to the applicability of the Act to a certain class of workers.[4]

Section 20(7) lays down that the Authority under Section 20(1) has all the powers of a Civil Court under the Civil Procedure Code for the purpose of :

(a) taking evidence ;

(b) enforcing the attendance of witnesses ; and

(c) compelling the production of documents.

Every such Authority shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXXV of the Criminal Procedure Code, 1898.

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1. *Pabbojan Tea Company Ltd.* v. *Deputy Commr. Lakhimpur*, AIR 1968 SC 271.
2. *The Malabari Tea Estate* v. *Sri Budhin Munda*, AIR 1959 Tripura 16.
3. (1995) 2 LLJ 1084 (MP).
4. *Pabbojan Tea Company Ltd.* v. *Deputy Commissioner Lakhimpur*, AIR 1968 SC 271.

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It was held in *Ponnambalan* v. *Authority under Minimum Wages Act*[1] that the liability of employer to pay minimum wages to the employee does not depend upon the consent of the employer. The liability to pay is attracted whenever wages paid by the employer is found to be less than the minimum rates of wages. In such a case the Authority has power to award compensation not exceeding 10 times the amount of such excess to which the employee is entitled. It was further held that even in a case where the claim made by the employee is less than the amount he is entitled to under the Act, it would be open to the Authority to step in and award the amount to which he is entitled within the limits of the Act.

The language of the Minimum Wages Act clearly leads to the inference that this Act is primarily concerned with laying down rules for fixing rates of minimum wages, overtime rates, rate for payment for work on a day of rest. It is not an Act for enforcement of payment of wages for which provision has been made in the Payment of Wages Act, 1936. The Authority appointed under Section 20(1) decides claims which relates to rates of wages, rates for payment of work done on days of rest and overtime rates. The purpose of Section 20(1) is to ensure that the rates prescribed under the Minimum Wages Act are complied with by the employer in making payments and if any attempt is made to make payments at lower rates, the workmen are given the right to invoke the aid of the Authority appointed under Section 20(1).[2] Section 20(1) cannot be invoked in respect of an application in which the claim of the workmen is for computation of their benefit at a certain rate for overtime work and work done on weekly off days where the employer contesting the application does not raise a dispute in relation to the rates pleaded by the workman but merely alleges that no rates at all had been prescribed by the Government.[3] The power to make orders for payment of actual amount due to an employee under Section 20(3) cannot be interpreted as providing that the jurisdiction to the Authority under Section 20(1) has been given for the purposes of enforcement of payment of amounts and not for the purpose of ensuring compliance by the employer with the various rates fixed under the Act.[4]

In *Patel Iswerbhai Prahladbhai etc.* v. *Taluka Development Officers and others*,[5] the question in appeal was whether the tube-well operators of Taluk and District Panchayats are entitled to the benefits of the Minimum Wages Act. It was held by the Supreme Court that there is no doubt that the tubewell operators are in scheduled employment under the Panchayats. They, even though State Government servants are employed in scheduled employment under the local authority or authorities and hence are entitled to minimum wages and other benefits under the Act.

In *Modern Paper Converters* v. *S.V. Kotnis & others*,[6] it was held that availability of remedy under Section 20 of this Act does not necessarily exclude the jurisdiction of the Labour Courts to entertain an application under Section 33-C (2) of the Industrial Disputes Act, 1947.

In *Vimal Printers* v. *Omana*[7] it was held that the Minimum Wages Act is not a self contained code incorporating all the provisions relating to payment of wages, or even minimum wages and a claim enforceable under Section 20 of the Act could also be agitated under Section 33-C (2) of the Industrial Disputes Act, 1947. Section 24 of the Minimum Wages Act prevents a Court from entertaining a civil suit for recovery of

1. (1994) 1 LLJ 1195 (Kerala).
2. *Town Municipal Council Athani* v. *Presiding Officer Labour Court, Hubli*, AIR 1969 SC 1335.
3. *Ibid.*
4. *Ibid.*
5. (1983) 1 LLJ 237 (SC).
6. (1982) 1 LLJ 394 (Bom).
7. (1983) 1 LLJ 342 (Kerala).

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wages, which could be recovered by filing application under Section 20. The Legislature did not want to exclude other remedies.

In *Tallam Sreeramamurthy* v. *The Authority under Minimum Wages, Act, 1948, Guntur and another*,[1] the petitioner was carrying on business in processing the raw tobacco. He had employed about 400 workmen and the wages payable to these workers were fixed by the Andhra Pradesh Government. The employer claimed that the difference between wages due and the amount actually paid was paid by issuing bearer cheque in the name of workmen. All the Workemn were illiterate and none of them had a bank account. There was no evidence to show that cheques were encashed by workmen. The workmen denied any payment having been made to them. On these facts it was held that payment of wages to workmen through cheques is unknown because the workmen cannot go through the ordeal of realising the cheques through their respective bank accounts. It was usual trade custom to make payment of wages in cash and obtain the acquiantance of workmen. All the cheques issued by the employer are bearer which are cashed across the bank counter and there is no evidence that cheques were encashed by the workmen across the counter. It was for the employer to lead evidence and establish that workmen received the payment. Therefore, there is nothing unreasonable or arbitrary in drawing the conclusion that the amounts claimed to have been paid by cheques to workmen found their way back to the employer. Therefore, the order relating to payment of compensation equal to twice the amount short paid in the minimum wages by the employer is also justified.

In *Rajasthan Minerals and Company* v. *Authority under Minimum Wages Act & another*,[2] the authority directed the payment of the difference of wages arising out of less payment of minimum wages and compensation to the extent of 8 times of the difference of amount of wages. The employer challenged the above order. It was held that no reason has been given in the impugned order for awarding so heavy amount of compensation. The petitioner has not disobeyed the provisions of the Act on earlier occasion and the Inspector inspected the mines for the first time. If the Inspector would have inspected the mines earlier, the claim of wages and compensation would not have been so high. The amount of compensation was, therefore, held to be highly excessive and compensation equal to the amount of wage difference was held to be reasonable. As far as the question of filing affidavit along with application for condonation of delay is concerned, no such affidavit is required under the Act or the Rules made thereunder. Satisfaction of the authority with the explanation for delay is enough. Hence the order of the authority regarding condonation of delay cannot be said to be perverse.

Section 21. Single application in respect of a number of employees.—Subject to the rules as may be prescribed, a single application may be presented for claims on behalf or in respect of any number of employees employed in the scheduled employment in respect of which minimum rates of wages have been fixed. When any such joint application is presented the minimum compensation which may be awarded under Section 20(3) shall not exceed ten times the aggregate amount of such excess or ten rupees per head, as the case may be.

Section 21(2) lays down that the authority may deal with any number of separate pending applications presented, under Section 20 in respect of employees in the scheduled employments in respect of which minimum rates of wages have been fixed, as a single application presented under Section 21(1) and the provisions of that sub-section shall apply accordingly.

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1. (1989) 2 Lab LJ 241 (AP).
2. (1994) 1 LLJ 261 (Raj).

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CHAPTER III
MISCELLANEOUS

Section 22. Penalties for certain offences.—Section 22 lays down that an employer shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both, if he—

(1) pays to any employee less than the minimum rates of wages fixed for that employee's class of work, or less than the amount due to him under the provisions of this Act ; or

(2) contravenes any rule or order made under Section 13.

The Court, while imposing any fine for an offence under this section, shall take into consideration the amount of any compensation already awarded against the accused in any proceedings taken under Section 20.

Section 22-A. General provisions for punishment of other offences.—According to Section 22-A any employer who contravenes any provision of this Act or of any rule or order made thereunder shall, if no other penalty is provided for such contravention by this Act, be punishable with fine which may extend to five hundred rupees. When the question relates to non-payment of wages for work done on Sundays which is referred to Industrial Tribunal, the Tribunal cannot allow any additional payment as penalty under this section.[1]

In *Champak Lal Thakkar* v. *State of Gujarat*, Morvi Vegetable Products Ltd., and its Managing Director and Secretary were prosecuted under Section 22-A of the Minimum Wages Act for their failure to maintain certain documents which were required to be maintained under Section 18 of the Act. The prosecution was possible only when the Act applied to a mill manufacturing Vanaspati. Employment in any oil mill is covered by item 5 of Part I of the Schedule to the Act. Therefore, the Act could apply to the company only when a mill manufacturing Vanaspati was covered under the head "oil mill". It was held that the word 'oil' is not defined in the Act and, therefore, its dictionary meaning may be applied. In view of the meaning of the word 'oil' as given in Webster's Dictionary 'Vanaspati' is essentially an oil although it is a different kind of oil than that oil which forms its basic ingredient. Oil will remain oil if it retains its essential properties and merely because it has been subjected to certain processes would not convert it into different substance. Therefore, prosecution of the petitioners under Section 22-A was possible.

Section 22-B. Cognizance of offences.—No Court shall take cognizance of a complaint against any person for an offence—

(a) under clause (a) of Section 22 unless an application in respect of the facts constituting such offence has been presented under Section 20 and has been granted wholly or in part, and the appropriate Government or an officer authorised by it in this behalf has sanctioned the making of the complaint ;

(b) under clause (b) of Section 22 or under Section 22-A, except on a complaint made by or with the sanction of an Inspector.

Section 22-B (2) provides that no Court shall take cognizance of an offence—

(a) under clause (a) or clause (b) of Section 22, unless complaint thereof is made within one month of the grant of sanction under this section ;

1. *Workmen of the Bombay Port Trust* v. *Trustees of the Port of Bombay*, AIR 1962 SC 481.

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(b) under Section 22-A unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed.

Section 22-C. Offences by companies.—Section 22-C deals with an offence committed by a company. Where an offence under this Act is committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, unless such person proves that :—

(i) the offence was committed without his knowledge ; or

(ii) he exercised all due diligence to prevent the commission of such offence.

Section 22-C (2) provides that where an offence under this Act has been committed by a company and it is proved that (i) offence has been committed with the consent or connivance of, or (ii) is attributable to any neglect on the part of any Director, Manager, Secretary or other Officer of the Company, such Director, Manager, Secretary or other officer of the Company shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of Section 22-C :—

(a) "company" means any body corporate and includes a firm or other association of individuals ; and

(b) "director" in relation to a firm means a partner in the firm.

It was held in *Haricharan Singh Dugal and others* v. *State of Bihar*,[1] that Section 22-C of the Minimum Wages Act, 1948, is in *pari materia* with Section 10 of the Essential Commodities Act, and therfore, Directors of a Company can be prosecuted along with the company under the Minimum Wages Act and the rules, if a violation is committed. It is necessary to keep in point the specific part played by each of them or their individual responsibility in the complaint.

Section 22-D. Payment of undisbursed amounts due to employees.—According to Section 22-D all amounts payable by an employer to an employee (i) as the amount of minimum wages of the employee under this Act ; or (ii) otherwise due to the employee under this Act or any other rule or order made thereunder shall be deposited with prescribed authority, if the same could not be or cannot be paid to the employee on account of his death before payment or an account of his whereabouts not being known. The prescribed authority shall deal with money so deposited in such manner as may be prescribed.

Section 22-E. Protection against attachment of assets of employer with Government.—Section 22-E lays down that any amount deposited with the appropriate Government by an employer to secure the due performance of a contract with the Government and any other amount due to such employer from that Government in respect of such contract shall not be liable to attachment under any decree or order of any court in respect of any debt or liability incurred by the employer other than any debt or liability incurred by the employer towards any employee employed in connection with the contract aforesaid.

Section 22-F. Application of Payment of Wages Act, 1936 to scheduled employments.—Section 22-F lays down that, notwithstanding anything contained in the Payment of Wages Act, 1936, the appropriate Government may by notification in the official Gazette, direct that, subject to the provisions of sub-section (2) of Section 22-F, all or any of the provisions of the said Act shall with such modifications, if any, as may be specified in the notification, apply to wages payable to employees in such scheduled employments as may be specified in the notification.

1. (1990) 1 Lab LJ 110 (Patna).

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Section 22-F(2) provides that where all or any of the provisions of the Payment of Wages Act, 1936 are applied to wages payable to employees in any scheduled employment under sub-section (1), the Inspector appointed under this Act shall be deemed to be the Inspector for the purpose of enforcement of the provisions so applied within the local limits of his jurisdiction.

Section 23. Exemption of employer from liability in certain cases.—Where an employer is charged with an offence under this Act, he is entitled to file a complaint against the actual offender. On his complaint the actual offender shall be given notice and brought before the court at the time appointed for hearing the charge. Thus both actual offender and the employer shall be tried, but the trial shall start on original complaint and the onus to bring the charges at home shall be on the original complainant. If the commission of the offence is proved, the employer shall be liable unless he proves to the satisfaction of the court that—

(i) he has used diligence to enforce the execution of this Act ; and

(ii) the said other person committed the offence in question without his knowledge, consent or connivance.

If the employer succeeds in establishing the existence of one or the other of the two circumstances, the actual offender shall be convicted of the offence and the employer shall be discharged. The employer in seeking to prove his innocence may be examined on oath. The employer or his witness shall be cross-examined by or on behalf of the person whom the employer charges as actual offender by the prosecution.

Section 24. Bar of suits.—Section 24 bars the jurisdiction of any court to entertain any suit for the recovery of wages in so far as the sum so claimed—

(a) forms the subject of an application under Section 20 which has been presented by or on behalf of the plaintiff, or

(b) has formed the subject of a direction under that section in favour of the plaintiff ; or

(c) has been adjudged in any proceeding under that section not to be due to the plaintiff ; or

(d) could have been recovered by an application under that section.

Thus any claim arising (i) out of payment of less than the minimum rate of wages ; (ii) in respect of payment of remuneration for days of rest, or for work done on such days ; or (iii) of wages at overtime rates may be entertained only by the Authority under Section 20 of the Act. Any other court has no jurisdiction to entertain any suit in respect of the above claims. Though this section creates an express bar in respect of suit for recovery of wages in certain eventualities, the obvious intention was that a poor employee was not to be driven to file a suit for the payment of the deficit of his wages but that he would avail himself of the machinery provided by the Act to get quick relief. It does not in terms bar the employer from instituting a suit when his claim is that he has called upon to pay wages and compensation to persons who are not governed by the notification under the Minimum Wages Act, 1948.[1]

The Act while making provision for the constitution of an authority to decide all claims arising out of the payment of less than the minimum rates of wages has merely barred the filing of the suit under Section 24 of the Act. This Act, however, does not bar the jurisdiction of any other Tribunal or Authority which may have jurisdiction to entertain such a claim. The fact that the Parliament while making provision for the constitution of an authority under Section 20 of this Act, chose only to bar institution of suits in a civil court for the recovery of wages, far from indicating that the jurisdiction of either Tribunal or the Authorities is barred discloses an intention not to

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1. *Pabbojan Tea Company Ltd.* v. *Deputy Comm. Lakhimpur*, AIR 1968 SC 371

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impinge upon their jurisdiction.[1]

Express bar provided under Section 24 is only against suits for recovery of minimum wages and no bar is created against the remedies in Section 33 of the Industrial Disputes Act. To read a bar against remedies other than suits would be re-writing and extending the bar beyond the express legislative intent. Labour Court has the jurisdiction to entertain recovery application and there is no provision in the Minimum Wages Act which bars the jurisdiction of the Labour Court under Section 33-C of the Industrial Disputes Act.[2]

Section 25. Contracting out.—According to Section 25 any contract or agreement, whether made before or after the commencement of this Act, shall be null and void in so far as it purports to reduce the minimum rates of wages fixed under this Act if by such contract an employee relinquishes or reduces his—

(i) right to a minimum rate of wages ; or

(ii) any privilege or concession accruing to him under this Act.

Section 25 is a provision of absolute prohibition against contracting out of the benefit and privileges under the Minimum Wages Act. Even if the employee relinquishes or reduces his right to minimum rate of wages or any privileges or concessions accruing to him under the Act, it shall be null and void in so far as it purports to reduce the minimum rates of wages fixed under the Act. Any agreement reducing the minimum rates of wages is null and void as it violates Section 25.[3]

Section 26. Exemptions and exceptions.—The appropriate Government under Section 26 has been given power to direct that provisions of this Act shall not apply to wages payable to disabled employees. While doing so the Government concerned may impose such conditions as it considers necessary. The appropriate Government may for special reasons exempt from the application of all or any of the provisions of this Act all or any class of employees employed in any scheduled employment or to any locality where a scheduled employment is carried on. Any such exemption shall be subject to such conditions and for such period as may be specified by the Government concerned by an official Gazette notification. Where the employees in a scheduled employment generally or in a scheduled employment in a particular local area are in receipt of wages exceeding the limit of minimum rate prescribed under this Act, the appropriate Government may direct that all or any of the provisions of the Act shall not apply to such employees. Any such exemption shall be made by issuing an official Gazette notification and shall be subject to such conditions as may, in the opinion of the Government concerned, be specified in the notification. The provisions of this Act shall not apply to the wages payable by an employer to a member of his family who is living with him and is dependent on him. A member of employer's family, for the purposes of this section, includes is or her spouse or child or parent or brother or sister.

Section 27. Power of State Government to add to Schedule.—The appropriate Government, after giving by notification in the Official Gazette not less than three months' notice of its intention so to do, may, by like notification, add to either Part of the Schedule any employment in respect of which it is of opinion that minimum rates of wages should be fixed under this Act, and thereupon the Schedule shall, in its application to the State, be deemed to be amended accordingly.

In *Mahavoor Farmers Service Co-operative Society Ltd.* v. *Inspector of Labour and another*,[4] the society was running a fair price shop for the benefit of its members.

1. *Anand Oil Industries* v. *Labour Court, Hyderabad*, AIR 1979, AP 182.
2. *Somiben Mathurabhai Vasava* v. *M/s. Lalji Hakku Parmar Leather Works Co.*, (1984) 2 LLJ 381 (Guj).
3. *Ibid.*
4. (1996) 1 LLJ 319 (Madras).

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The question was whether employees of the shop are entitled to minimum wages. In exercise of power under Section 27 of the Minimum Wages Act. The Tamilnadu Government has added printing press shop, commercial establishment and cinemas in the Schedule to the Act. It was held that in view of the facts stated above the fair price shop run by the Co-operative Society falls within the definition of 'Shop' and employment in such Shop is a scheduled employment under the Act. Since the employees in Fair Price shop were not getting regular salary in a particular scale, they do not fall within the cadre of employment created in the co-operative society and as such they are entitled for minimum wages fixed under the Act.

Section 28. Power of the Central Government to give directions.—The Central Government may give directions to a State Government as to the carrying into exceution of this Act in the State.

Section 29. Power of the Central Government to make rules.—The Central Government may, subject to the condition of previous publication, by notification in the Official Gazette, make rules prescribing the term of office of the members, the procedure to be followed in the conduct of business, the method of voting, the manner of filling up casual vacancies in membership and the quorum necessary for the transaction of business of the Central Advisory Board.

Section 30. Power of the appropriate Government to make rules.—(1) The appropriate Government may, subject to the condition of previous publication, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the term of office of the members, the procedure to be followed in the conduct of business, the method of voting, the manner of filling up casual vacancies in membership and the quorum necessary for the transaction of business of the committees, sub-committes [* * *] and the Advisory Board ;

(b) prescribe the method of summoning witnesses, production of documents relevant to the subject-matter of the enquiry before the committees, sub-committes [* * *] and the Advisory Board ;

(c) prescribe the mode of computation of the cash value of wages in kind and of concessions in respect of supplies of essential commodities at concessional rates ;

(d) prescribe the time and conditions of payment of, and the deductions permissible from wages ;

(e) provide for giving adequate publicity to the minimum rates fixed under this Act ;

(f) provide for a day of rest in every period of seven days and for the payment of remuneration in respect of such day ;

(g) prescribe the number of hours of work which shall constitute a normal working day ;

(h) prescribe the cases and circumstances in which an employee employed for a period of less than the requisite number of hours constituting a normal working day shall not be entitled to receive wages for a full normal working day ;

(i) prescribe the form of registers and records to be maintained and the particulars to be entered in such registers and records ;

(j) provide for the issue of wage books and wage slips and prescribe the manner of making and authenticating entries in wage books and wage slips ;

(k) prescribe the powers of inspectors for purposes of this Act ;

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(l) regulate the scale of costs that may be allowed in proceedings under Section 20 ;

(m) prescribe the amount of court-fees payable in respect of proceedings under Section 20 ; and

(n) provide for any other matter which is to be or may be prescribed.

Section 30-A. Rules made by the Central Government to be laid before Parliament.—Every rule made by the Central Government under this Act shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Section 31. Validation of fixation of certain minimum rates of wages.—Where during the period—

(a) commencing on the 1st day of April, 1952, and ending with the date of the commencement of the Minimum Wages (Amendment) Act, 1954 ; or

(b) commencing on the 31st day of December, 1954 and ending with the date of the commencement of the Minimum Wages (Amendment) Act, 1957 (30 of 1957) ; or

(c) commencing on the 31st day of December, 1959, and ending with the date of the commencement of the Minimum Wages (Amendment) Act, 1961,

minimum rates of wages have been fixed by an appropriate Government as being payable to employees employed in any employment specified in the Schedule in the belief or purported belief that such rates were being fixed under Clause (a) of sub-section (1) of Section 3, as in force immediately before the commencement of the Minimum Wages (Amendment) Act, 1954, or the Minimum Wages (Amendment) Act, 1957, or the Minimum Wages (Amendment) Act, 1961 as the case may be, such rates shall be deemed to have been fixed in accordance with law and shall not be called in question in any court on the ground merely that the relevant date specified for the purpose in that clause had expired at the time the rates were fixed :

Provided that nothing contained in this section shall extend, or be construed to extend, to affect any person with any punishment or penalty whatsoever by reason of the payment by him by way of wages to any of his employees during any period specified in this section of an amount which is less than the minimum rates of wages referred to in this section or by reason of non-compliance during the period aforesaid with any order or rule issued under Section 13.

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THE PAYMENT OF WAGES ACT, 1936

CHAPTER I
PRELIMINARY

Introduction.—The need to protect the wages earned by the worker had been felt from the early years of the twentieth century, but it was as early as 1925 that a Private Bill called the "Weekly Payment Bill" was for the first time introduced in the Legislative Assembly. At that time different periods of payment of wages were prevalent. An attempt was made to remedy some of the evils *viz.*, delay in payment of wages, non-payment of wages, deductions made from wages on account of fines imposed by the employer etc. The Bill was, however, withdrawn on an assurance of the Government that the matter was under consideration of the Government. Imposition of fines by employers on workers and deduction of even double the amount of wages for absence period by way of fine was very much customary in those days. The desirability of regulating the extent of fines and other deductions, through legislation was felt by the Government in 1926.

The Royal Commission on Labour in India made some valuable recommendations. The present Act is mostly based on those recommendations. The Commission was of the opinion that legislation regarding deductions from wages and fines was essential. The following recommendations are worth citing :—

(i) Children should be exempt from fine.

(ii) The minimum amount which could be deducted by way of fine should not exceed in any month half an anna in the ruppee of the worker's earnings.

(iii) The sum realised as fine should be utilised for some purpose beneficial to the employees as a class and should be approved by some recognised authority.

(iv) A notice specifying the acts and omissions in respect of which fines may be imposed should be posted and any other fine should be deemed to be illegal.

(v) Any deduction made for goods having been damaged should not exceed the wholesale price of the goods damaged.

(vi) Deductions may be made on account of provision for housing accommodation and of tools and raw materials.

(vii) Imposition of any fine and deduction made which is not permitted by law should be made penal.

A Bill of Payment of Wages Act, based on the recommendations of the Royal Commission on Labour was introduced in the Legislative Assembly in 1933 but could not take the shape of the Act because of the dissolution of the Assembly. The Payment of Wages Act was passed in 1936 and came into force on 21st March, 1937.

Object.—The preamble of the Act states that the object of the Act is "to regulate the payment of wages to certain classes of employed persons." The relation contemplated by the Act is twofold : first the date of payment of wages and secondly the deductions from wages whether as fine or otherwise. To ensure payment of wages to persons covered by the Act certain provisions have been made in this Act. The

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Bombay High Court in *Arvind Mills Ltd.* v. *K.R. Gadgil*,[1] observed that "the general purpose of the Act is to provide that employed persons shall be paid their wages in a particular form and at regular intervals without any unauthorised deductions". The use of the expression "certain classes of persons" in the preamble is important, for the Act applies to persons drawing on an average less than one thousand six hundred rupees a month.[2] Any deduction from the wages or salaries of the workmen governed by the Payment of Wages Act, unless authorised by the Act shall be deemed to be illegal. Any deduction from the wages of the workmen, under a settlement between representative Union and employer can, however, permit a deduction as it is the outcome of an understanding between the parties even though such deduction may not be authorised or legally permissible under the Act.[3]

Section 1. Application.—The Payment of Wages Act, 1936 extends to the whole of India. It came into operation on 21st March, 1937.

According to sub-section (4) this Act applies in the first instance to the payment of wages to :

(i) persons employed in any factory ;

(ii) persons employed (otherwise than in factory) upon any railway by a railway administration, or either directly or, through a sub-contractor, by a person fulfilling a contract with a railway administration ; and

(iii) persons employed in an industrial or other establishment specified in sub-clauses (a) to (g) of clause (ii) of Section 2 of this Act.

Sub-section (5) empowers the State Government to extend the application of the whole or part of the Act to payment of wages to any class of persons employed in the establishment or class of establishments specified by the Central Government or a State Government under sub-clause (h) of clause (ii) of Section 2.

The exercise of power by the State Government is subject to two conditions :

(i) issue of three months' prior notice of its intention to do so ; and

(ii) a notification of the extention in the official Gazette ;

Provided that a relation to any such establishment owned by the Central Government, no such notification shall be issued except with the concurrence of that Government.

According to sub-section (6) this Act shall not apply to wages payable in respect of a wage period if average wage for such wage period is one thousand six hundred rupees or more a month.

In *Indian Statistical Institute* v. *State of West Bengal & others*,[4] the Indian Statistical Institute employed about 2000 persons in various departments or in connection with its work. It was held that in Osmania University case,[5] the Supreme Court has held that Factories Act was applicable to the press of the University. This principle applies to Indian Statistical Institute also and it will be covered by the Payment of Wages Act.

The expression 'wages' used in sub-section (6) of Section 1 would relate to the contractual wages and not to overtime allowance claimed by a worker. Section 1(6) relates to the contractual wages claimable by a workman on an average per month having regard to the fact that the wages may be payable daily or weekly or by some

1. AIR 1941 Bom 26.
2. The Payment of Wages Act, 1936, Section 1(6).
3. *Balmer Lawrie Worker's Union, Bombay and another* v. *Balmer Lawrie and Company Ltd. and others*, (1985) 1 LLJ 314 (SC).
4. (1994) 1 LLJ 75 (Cal).
5. 1985 (51) FLR 614.

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other wage period not exceeding one month. The overtime wages claimed do not have to be taken into account in determining the question as regards the applicability of the Payment of Wages Act in the context of Section 1(b).[1]

In *Baboo Husain* v. *N.P. Nopany*,[2] the petitioner was employed as boiler attendant and he had to keep himself available during all the three shifts. It was held that when a serious responsibility is cast on the employee and he has by and large, to remain on or about the premises of the employer throughout and make himself available to meet the demands which can or may arise the employee cannot properly attend to any of his private work or leave the premises or consider himself free to do what he likes as if he were off duty. Such an employee would be considered as being on duty even if he may not actually be working.

Section 2. Definitions

Section 2 of the Act defines various terms and expressions used in the Act.

(i) Employed person.—'Employed person' includes the legal representative of a deceased employed person.

(ia) Employer.—'Employer' includes the legal representative of a deceased employer.

(ib) Factory.—'Factory' means a factory as defined in Section 2(m) of the Factories Act, 1948 and includes any place to which the provisions of that Act have been applied under Section 85(1) thereof.

The following have been held "factory" within the meaning of the term in the Factories Act, 1948 :—

(i) a Saw mill and ginning factory under the same roof and operated by same locomotive power employing not less than ten persons.[3]

(ii) Premises where anything is done towards making or finishing of an article upto the saleable stage.[4]

(iii) Any premises where manufacturing process is carried on, such as machine rooms, sheds, godowns and yards etc.[5]

(iv) A Gurhal Ghar factory,[6] a railway workshop[7] and a yard used for drying ground nuts.[8]

(ii) Industrial orother establishment.—'Industrial or other establishment' means any—

(a) tramway service, or motor transport engaged in carrying passengers, goods or both by road for hire or reward ;

(aa) air transport service, other than such service belonging to, or exclusively employed in the military, naval, or air force of the Union or Civil Aviation Department of the Government of India ;

(b) dock, wharf or jetty ;

(c) inland vessel, mechanically propelled ;

(d) mine, quarry or oil field ;

(e) plantation ;

(f) workshop or other establishment in which articles are produced, adapted or

1. *Baboo Husain* v. *N.P. Nopany*, (1979) 1 LLJ 103 (Guj).
2. (1979) 1 LLJ 103 (Guj).
3. *Jaichand* v. *Vithal*, AIR 1933 Bom 109.
4. *Prag Narain* v. *Crown*, AIR 1928 Lah 78.
5. *Ramanandham* v. *King Emperor*, AIR 1927 Mad 345.
6. *Ganpat Dattu Raskar* v. *Emperor*, AIR 1930 Bom 162.
7. *Indar Singh* v. *Secy. of State*, AIR 1929 Lah 573.
8. *Ramanandam* v. *King Emperor*, AIR 1927 Mad 345.

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manufactured with a view to their use, transport or sale ;

(g) establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on ;

In the *Tamil Nadu Water Supply and Drainage Board and another* v. *M.D. Vijayakumar and others*,[1] the Tamil Nadu Water Supply and Drainage Board was created for regulation and development of drinking water and drainage in the State of Tamil Nadu. It was held that in view of Clause (g) of Section 2(ii) and the statement of objects and reasons under which the Board has been created, it is clear that the Board is an establishment in which work relating to operations connected with supply of water is being carried on and consequently it is an establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act.

(h) any other establishment or class of establishments which the Central Government or a State Government may having regard to the nature thereof, the need for protection of perons employed therein and other relevant circumstances, specified by notification in the Official Gazette.

In *K.L. Garg* v. *New India Assurance Co. Ltd. and others*,[2] the petitioner an employee of the New India Assurance Company was dismissed from service. He filed an application under Section 15(2) of the Payment of Wages Act for the recovery of Rs. 1350/- as an *ex gratia* in lieu of bonus along with interest amounting to Rs. 1267/- *i.e.*, a total of Rs. 2617. He also claimed compensation at ten times the wages. The wages deducted *i.e.*, a sum of Rs. 26170. It was held that the provisions of the Payment of Wages Act, 1936 are not applicable to the Insurance company as it does not fall within the definition of "Industrial or other establishment" as defined in Section 2(ii) of the Payment of Wages Act. No notification as contemplated in clause (h) of Section 2(ii) has been issued either by the Central or State Government. In the absence of any such notification, no application as such was maintainable under Section 15 of the Act against the Insurance company.

(ii-a) Mine.—'Mine' has the meaning assigned to it in clause (j) of Section 2(1) of the Mines Act, 1952.

(iii) Plantation.—'Plantation' has the meaning assigned to it in clause (1) of Section 2 of the Plantations Labour Act, 1951.

(iv) Prescribed.—'Prescribed' means prescribed by rules made under this Act.

(v) Railway administration.—'Railway administration' has the meaning assigned to it in Section 3(5) of the Indian Railways Act, 1890.

(vi) Wages.—'Wages' means all remuneration, whether by way of salaries, allowanes or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment.

'Wages' includes :—

(a) any remuneration payable under any award or settlement between the parties or order of a Court ;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period ;

(c) any additional remuneration payable under the terms of employment,

1. (1991) 1 Lab CJ 260 (Madras).
2. (1992) 1 Lab LJ 190 (P & H).

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whether called a bonus or by any other name ;

The definition of wages is not limited to remuneration payable under an agreement or contract. The amended definition would apply to all kinds of remuneration, whether arising from a contract, an award, a settlement or under a statute ;[1]

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum whether with or without deductions, but does not provide for the time within which the payment is to be made ;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force.

Wages does not include :—

(1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court ;

The bonus payable under the Payment of Bonus Act, 1965 amounts to wages within the definition in this sub-section.[2]

(2) the value of any house accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or a special order of the State Government ;

(3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon ;

(4) any travelling allowance or the value of any travelling concession ;

(5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment ; or

(6) any gratuity payable on the termination of employment in cases other than those specified in sub-section (d).

The definition of the word "wages" under this Act does not appear to have undergone any change subsequent to the passing of Payment of Bonus Act in 1965. Statutory bonus of eight and one-third per cent is payable whether there are profits to the accounting year or not. After coming into force of the Payment of Bonus Act, bonus has become an implied term of employment not dependent upon the profits and therefore comes under the category of remuneration. Viewed in this light the wages as a general term would include bonus.[3]

The amount of retrenchment compensation payable to the employees, under Section 25-F(b) of the Industrial Disputes Act, 1947 are sums payable to the employee on the termination of the services and are, therefore, wages within the meaning of Payment of Wages Act, 1936.[4]

The amount of lay-off compensation under Section 25-C of the Industrial Disputes Act, 1947, does not come within the definition of wages as given in this Act.[5] Where the rule framed under the Motor Transport Workers Act, 1961 provided that each member of certain class of staff is entitled, as a part of a uniform, two pairs of Pathani chappals a year, the claim relating to value of Pathani chappals would fall within the

1. *D.P. Kelkar* v. *Ambadas*, AIR 1971 Bom 124.
2. *Ibid.*
3. *Gopalan* v. *Augmati Chit Fund*, AIR 1977 Ker 120.
4. *D.A. Divekar* v. *A.K. Shah*, (1955) 2 LLJ 501.
5. *Trichinopoly Mills Ltd.* v. *Swaminathan and others*, (1956) 1 LLJ 269 (Mad) ; Refer also to *Anusuyabai* v. *J.H. Mehta*, AIR 1960 Bom 201.

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definition of wages.[1]

It was held in *K.L. Garg* v. *New India Assurance Co. Ltd. and others*,[2] that an application for recovery of loan was not maintainable as loan did not fall within the definition of wages under Section 2(vi) of the Payment of Wages Act, 1936 nor the amount claimed could be said to be a deduction as provided under Section 7 of the Act.

In *Payment of Wages Inspector* v. *B.E.S. & Co.*,[3] the Supreme Court observed that, "A workman whose service is terminated in consquence of transfer of an undertaking whether by agreement or by operation of law has a statutory right under Section 25-F of the Indistrial Disputes Act 1947, to compensation unless such right is defeated under proviso to that section. The same is the position in the case of closure under Section 25-FFF of that Act. Such compensation would be wages as defined by Section 2(vi)(d) of the Payment of Wages Act, 1936, as it is sum which by reason of the termination of employment of the person employed, is payable under any law... which provides for the payment of such sum whether with or without deduction but does not provide for the time within which the payment is to be made".

It was held in *Purshottam* v. *Potadar*,[4] that expression by reason of the termination of employment in sub-clause (d) of Section 2(vi) must in the context have the same meaning as the expression, 'payable on the termination of employment' which is used in sub-clause (b). In other words gratuity which may be payable to an employee by reason of the termination of the employment would fall under sub-clause (b) provided it is shown that it is payable under any law, contract, or instrument. It is true that an award made by industrial adjudication framing a scheme of gratuity becomes enforceable under Sections 18 and 19 of the Industrial Disputes Act and in that sense it is a scheme which is enforceable by virtue of the operation of law. But that would not justify the conclusion that the gratuity itself is payable under any law. It is payable under an award which is made enforceable by Section 18 of the Industrial Disputes Act. Therefore, it cannot be said that the gratuity under an award is payable under any law.

Having regard to the object which the legislature had in mind in widening the scope of the definition it would not be unresonable to hold that the word 'instrument' has a wider denotation in the context and cannot be confined only to documents executed as between the parties. The scheme of the definition and the context of sub-clause (d) read with sub-clause (6) seems to suggest that the word 'instrument' would include awards made by Industrial Courts of competent jurisdiction.[5]

When an award is made and it prescribes a new wage structure, in law the old contractual wage structure becomes inoperative and its place is taken by the wage structure prescribed by the award.[6] When industrial disputes are decided by industrial adjudication and awards are made, the said awards supplant contractual terms in respect of matters covered by them and are substituted for them. Therefore, the term 'wages' as defined in Section 2(vi), of the Payment of Wages Act, 1936, as it stood prior to its amendment in 1957, includes wages fixed by an award. Though it is well settled that awards have on many occasions the effect of altering or modifying the contractual terms of employment between an industrial employer and his employees, it would be difficult to hold that the award as such is a contract.[7]

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1. *S.R.T. Corporation* v. *Industrial Court*, AIR 1971 MB 54.
2. (1992) 1 Lab LJ 190 (P & H).
3. AIR 1969 SC 590.
4. AIR 1966 SC 856.
5. *Ibid*
6. *Md. Quasim Larry* v. *Muhammad Samsuddin*, AIR 1964 SC 1699.
7. *Purshottam* v. *Potadar*, AIR 1966 SC 856.

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CHAPTER II
PAYMENT OF WAGES AND DEDUCTIONS FROM WAGES

Section 3. Responsibility for payment of wages.—Section 3 lays down that every employer shall be primarily responsible for the payment to person employed by him of all wages required to be paid under this Act. The following are exceptions to the above rule :—

(a) Where a person is employed (otherwise than by a contractor) in a factory and a manager is appointed for the factory under Clause (f) of Section 7(1) of the Factories Act, 1948, the manager shall be responsible for the payment of wages.

(b) In the case of persons employed (otherwise than by contractor) in industrial or other establishment, if there is a person responsible to the employer for the supervision and control of the industrial or other establishment, such person shall be responsible for the payment of wages ;

(c) In the case of persons employed (otherwise than by contractor) upon railways (otherwise than in factories), if the employer is the railway administration and the railway administration has nominated a person, in this behalf for the local area concerned, such person shall also be responsible for the payment of wages.

In *Cominco Binani Zinc Ltd.* v. *Pappachan*,[1] the appellant company was obliged to provide and maintain a canteen for its employees. The company entrusted the running of a canteen to the contractor. It was held that the responsibility to provide and maintain a canteen under Section 46 of the Factories Act cannot make the management the ultimate employer for the worker engaged in the canteen for all purposes. They are not workmen of the management. Therefore the liability of the principal employer is restricted only to pay wages if contractor fails to pay the same by virtue of Contract Labour Act, 1970.

Section 4. Fixation of wage period.—The person responsible for payment of wages under Section 3 shall fix wage periods in respect of which wages shall be payable. Such wage period shall not in any case exceed one month.

Section 5. Time of payment of wages.—If the number of persons employed upon or in any railway, factory or industrial or other establishment is less than one thousand persons, wages shall be paid before the expiry of the seventh day after the last day of the wage period. The wages of every person employed upon or in any other railway, factory or industrial or other establishment shall be paid before the expiry of tenth day of the last day of the wage period in respect of which the wage is payable :

Provided that in the case of persons employed on a dock, wharf, or jetty or in a mine, the balance of wages found due on completion of the final tonnage account of the ship or wagons loaded or unloaded, as the case may be, shall be paid before the expiry of the seventh day of such completion.

In case of the termination of employment of an employee, the wages earned by him shall be paid before the expiry of the second working day from the day on which

1. (1989) 1 Lab LJ 452 (Kerala).

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employment is terminated. If the employment of a person in an establishment is terminated due to the closure of the establishment for any reason other than a weekly or other recognised holiday the wages earned by him shall be paid before the expiry of the second day from the day on which his employment is so terminated. All payments of wages shall be made on a working day.

Section 5(3) provides that the State Government may to such an extent and subject to such condtions as may be specified in the order exempt the person, responsible for the payment of wages to persons employed upon any railway (otherwise than in a factory) or to persons employed as daily rated worker in the Public Works Department of the Central Government or the State Government, from the operation of Section 5 in respect of the wages of any such persons or class of such persons. In the case of persons employed as daily rated workers as aforesaid, no such order shall be made without consultation of the Central Government.

Section 6. Wages to be paid in current coins or currency notes.—All wages shall be paid in current coins or currency notes or in both. But the Payment of Wages (Amendment) Act, 1976 provides that the employer can, after obtaining the written authorisation of the employed person, pay him the wages either by cheque or by crediting the wages in his bank account. It was held in *S.R.T. Corporation* v. *Industrial Court*[1] that anything agreed to be paid in kind in the circumstances contemplated by the definition of 'wages' is covered by the expression 'capable of being expressed in terms of money' but as required by Section 6, it has to be converted into money according to its value and then paid in coins or currency notes. If this course is adopted there would be no contravention of Section 6 and Section 23 would not apply unless the contract or agreement expressly forbids such conversion into cash.

Section 7. Deduction which may be made from wages.—Section 7(1) of the Act provides that wages for employed person shall be paid to him without deductions of any kind except those authorised by or under this Act. Thus Section 7(1) lays down a general prohibition against any deduction from the wages of a worker. Sub-section (2) enumerates the deductions which are permissible and shall be made in accordance with the provisions of this Act.

What is deduction.—Explanation No. 1 to Section 7(1) says that every payment made by the employed person to the employer or his agent shall, for the purposes of this Act, be deemed to be a deduction from wages. Explanation No. 2 lays down that any loss of wages resulting from the imposition, upon a person, of the following penalties shall not be deemed to be a deduction from wages :—

(i) the withholding of increment or promotion including the stoppage of increment at any efficiency bar ;

(ii) the reduction to a lower post or time scale or to a lower stage in a scale ; or

(iii) suspension.

But these penalties shall not be deemed to be deductions provided the rules framed by the employer for the imposition of any such penalty are in conformity with the requirements, if any, which may be specified in this behalf by the State Government by notification in the Official Gazette.

Permissible deductions.—In view of Section 7(2) deductions from the wages of an employed person shall be made only in accordance with the provisions of this Act, and may be of the following kinds only, namely—

(a) fines ;

(b) **Deductions for absence from duty.**—Clause (b) of Section 7(2) permits

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1. AIR 1971 MP 54.

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deductions for absence from duty.

In the *Bank of India, Bombay and another* v. *T.S. Kelawala Bombay and others*,[1] the Bank employees demanded wage revision and pending acceptance of demand decided to go on 4 hours strike daily. Bank issued a circular to deduct full day's wages of such employees who participated in the strike. It was held that strikes and demonstrations are legitimate forms of protest and they are not banned in this country. By an administrative circular the legitimate mode of protest allowed and recognised by law cannot be stifled.

It was further held that Payment of Wages Act is regulatory. Section 7(2) read with Section 9 of the Act provides the circumstances under which and the extent to which deduction can be made. It is only when the employer has right to make deduction, resort should be had to the Act to ascertain the extent to which the deduction can be made. No deduction exceeding the limit provided by the Act is permissible even if the contract so provides. There cannot be any contract contrary to or in terms wider than the import of Sections 7 and 9 of the Act. Therefore wage deduction cannot be made under Section 7(2) of the Payment of Wages Act if there is no such power to the employer under the terms of contract.[2]

In *Surendranathan Nair and others* v. *Senior Divisional Personal Officer (Rlys.)*[3] some of the railway employees had applied for casual leave for participating in an agitation against the Railway Administration. The leave was refused but the employees participated in the agitation. The management deducted the wages treating the period of leave applied for as absence from duty. It was held that the leave rules to the railway employees are contained in the Railway Establishment Code and the rules made thereunder. The Code derives its authority from Article 309 of the Constitution and the rules are made under the delegated power. These rules have general application to all non-gazetted railway servants. Rejection of leave under such circumstances was legal and proper. Absence from duty, especially for the purpose of participation in an agitation against the management is unauthorised. An unauthorised absentee has no right to compel payment of wages for the period of unauthorised absence.

In *Mineral Miner's Union* v. *Kudremukh Iron Ore Co. Ltd.*[4] it was held by the Karnataka High Court that deduction of wages for the strike period is justified provided strike was illegal.

In *French Motor Car Co. Ltd. Workers Union* v. *French Motor Car Co. Ltd.*,[5] three questions have been decided. Some employees of the company indulged in go slow and resorted to strike for 3 days and 29 employees were not allowed by the employer to resume work unless they sign a guarantee bond. It has been held that on the principle of 'no work no pay' the management was justified in deducting the wages of 3 days *i.e.*, the strike period. Further the authority under the Payment of Wages Act is not competent to examine whether the strike was legal or not. The wages of the workmen could be deducted under Section 7(2)(b) for absence from duty. However, the absence from duty by an employee must be voluntary and it cannot cover his absence when he is forced by circumstances created by the employer from carrying out his duty. Therefore no deduction can be made from wages of 29 employees whose absence was not voluntary, inasmuch as they were not allowed to resume their work without signing the guarantee bond. The third question related to non-payment of variable. D.A. and the case of employees was that such non-payment should be treated as deduction. It was

1. (1988) 2 Lab LJ 264 (Bom).
2. *Ibid.*
3. (1988) 1 Lab LJ 227 (Kerala).
4. (1989) 1 Lab LJ 227 (Karn).
5. (1988) 1 Lab LJ 197 (Gauhati).

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held that the question whether the employees are entitled to get variable D.A. or not cannot be treated as deduction, and as such, the wage court has no jurisdiction to entertain this claim.

(c) deduction for damage to or loss of goods expressly entrusted to the employed person for custody ; or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default ;

(d) deduction for house accommodation supplied by the employer or by Govenment or any housing Board set up under any law for the time being in force (whether the Government or the Board is employer or not) or any other authority engaged in the business of subsidising house accommodation which may be specified in this behalf by the State Government by notification in the official Gazette ;

(e) deduction for such amenities and services supplied by the employer as the State Government or any officer specified by it in this behalf may by general or special order authorise.

Explanation.—The word "services" in this sub-clause does not include the supply of tools and raw material required for the purposes of employment ;

(f) deductions for recovery of advances of whatever nature (including advances for travelling allowance) and the interest due in respect thereof, or for an adjustment of overpayments of wages.

Deductions for recovery of loans made from any fund.—Clause (ff) of sub-section (2) of Section 7 provides that deduction may be made for recovery of loans made from any fund constituted for the welfare of labour in accordance with the rule approved by the State Government, and the interest due in respect thereof.

According to clause (fff) of Section 7(2) deductions are permitted for recovery of loans granted for house building or other purposes approved by the State Government and the interest due thereon.

Income-tax payable by the employed person may be deducted from his wages according to clause (g) of sub-section (2) of Section 7. It may be recovered in monthly instalments.

Clause (h) of Section 7(2) lays down that deductions, required to be made by order of a Court or other authority competent to make such order may be made from the wages of an employed person.

Clause (i) of Section 7(2) lays down certain conditions which are required to be fulfilled before making any deductions, for subscription to and for repayment of advances from any provident fund, from the wages of an employed person. These conditions are—

(i) the provident fund must be one to which the Provident Fund Act, 1952 applies ; or

(ii) the provident fund must have been recognised by the Commissioner of Income Tax as defined in Section 58-A of the Indian Income-tax Act, 1922 ; or

(iii) the provident fund must have been approved in this behalf by the State Government. But in this case a deduction can only be made during the continuance of approval by the State Government.

Clause (ii) of Section 7(2) provides that deductions for contributions to the National Defence Fund, or to any Defence Savings Scheme approved by the State Government may be made from the wages of an employed person. But any such deduction may be made if the following conditions are satisfied :—

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(i) deduction must be authorised in writing by the employed person ; or

(ii) deduction must be authorised in writing by the President or Secretary of the registered Trade Union of which the employed person is a member on such conditions as may be prescribed.

Clause (j) of Section 7(2) lays down that deductions for payments to co-operative societies approved by the State Government or any officer specified by it in this behalf or to a scheme of insurance maintained by the Indian Post Office may be made from the wages of an employed person.

Clause (k) of Section 7(2) provides that deductions may be made with the written authorization of the person employed for payment of any premium on his life insurance policy to the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 ; or for the purchase of securities of the Government of India or any State Government or for being deposited in any Post Office Savings Bank in furtherance of any saving scheme of any Government.

According to clause (kk) of Section 7(2) deduction may be made, with written authorisation of the employed person for the payment of his contribution to any fund constituted by the employer or a trade union registered under the Trade Union Act, 1926 for the welfare of the employed persons or the members of their families, or both and approved by the State Government or any officer specified by it in this behalf during the continuance of such approval.

Clause (kkk) of Section 7(2) provides that deduction may be made, with the written authorisation of the employed person, for payment of the fees payable by him for the membership of any trade union registered under the Trade Union Act, 1926.

Under clause (l) deductions may be made for payment of insurance premia on Fidelity Guarantee Bonds.

Deduction for recovery of losses.—The following deductions for recovery of losses may be made from the wages of an employed person in accordance with the provisions of this Act :—

(i) clause (m) of Section 7(2) authorises deduction for recovery of losses sustained by a railway administration on account of acceptance by the employed person of counterfeit or base coins or mutilated or forged currency notes ;

(ii) clause (n) of Section 7(2) authorises deduction for recovery of losses sustained by railway administration on account of the failure of the employed person to invoice, to bill, to collect, or to account for the appropriate charges due to that administration, whether in respect of fares, freight, demurrage, wharfage and carriage or in respect of sale of food in catering establishment or in respect of sale of commodities in grain shops or otherwise ;

(iii) clause (o) of Section 7(2) allows deductions for recovery of losses sustained by a railway administration on account of any rebates, or refunds incorrectly granted by the employed person where such loss is directly attributable to his neglect or default.

But no such deductions under clause (m), (n) or (o) as aforesaid shall be made without giving the employed person an opportunity of showing cause against the deduction.[1] Any such deduction shall only be made in accordance with such procedure as may be prescribed for the making of deductions.[2]

Clause (p) of Section 7(2) permits any deduction to be made with the written

1. Section 10 (1-A) of the Payment of Wages Act, 1936.
2. *Ibid.*

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authorisation of the employed person, for the contribution to the Prime Minister's National Relief Fund or such other Fund as the Cental Government may, by notification in the official Gazette specify.

According to Clause (q) of Section 7(2) deductions may be made for contributions to any insurance scheme framed by the Central Government for the benefit of its employees.

Permissible total deductions.—Section 7(3) lays down that the total amount of deduction which may be made under sub-section (2) of Section 7 in any wage period from the wages of any employed person shall not exceed :

(i) in cases where such deductions are wholly or partly made for payment to Co-operative Societies under Clause (j) of Section 7(2), seventy-five per cent of such wages ; and

(ii) in any other case, fifty per cent of such wages.

If the total deductions authorised under Section 7(2) exceed the limits of seventy-five or fifty per cent of the wages, as the case may be, the excess may be recovered in such manner as may be prescribed.

Section 7(4) lays down that an employer, by virtue of the provisions of Section 7 shall not be precluded from recovering from the wages of the employed person or otherwise any amount payable by such person under any law for the time being in force other than the Indian Railways Act, 1890.

Deduction by order of court.—In *Municipal Corporation* v. *N.L. Abhyankar*,[1] a representative Union requested the employer to collect levies from the employee and remit the same to it. The employer refused to do so and the Union made an application to the Labour Court requesting the Court to order the employer to accept their request. The Labour Court ordered the employer to collect the levy as requested by the Union. In appeal the employer's contention was that no deductions other than those permissible under the Act can be made. It was held that while it is correct that no deductions can be made from the wages of an employee, other than those deductions which have been specifically set out in Section 7(2) of the Act, clause (h) of sub-section (2) of Section 7 clearly allows deduction "required to be made by order of a Court or other authorities competent to make such order". In view of this the Industrial Court or Labour Court are competent to make the order for deduction.

In the *Manager, Rajapalayam Mills Ltd.* v. *Labour Court, Madurai and another*,[2] an employee resigned from service. While in service the employee had taken loan for house building. The employer, after the resignation of the employee adjusted certain salary amount due to be paid to the employee against the house building loan. In a claim for salary by the employee it was held that after resignation the employee ceased to be in the employment and therefore, his relationship with the employee after resignation will be governed by the Contract Act and the provisions of sub-sections (1) to (3) of Section 7 of the Payment of Wages Act will not apply. In such a case it would be open to the employer to adjust the entire amount due on account of wages under Section 7(4) of the Payment of Wages Act.

In *Nathulal* v. *M.P. State Road Transport Corporation and others*,[3] a driver in the employment of Madhya Pradesh State Road Transport Corporation was found responsible for causing accident and was directed to pay Rs. 3,700/- as damages to Transport Corporation and the same was directed to be deducted in monthly instalments of Rs. 25/- from his salary. This order was challenged by the petitioner. It was held that

1. (1979) 2 LLJ 258 (Bombay).
2. (1987) 2 Lab LJ 39 (Mad).
3. (1986) 2 Lab LJ 255 (MP).

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section 7(2)(c) of the Payment of Wages Act permits deduction for damages only when the damages or loss is directly attributable to the negligence or default of the employee and in order to hold an employee negligent it is essential that he should be afforded an opportunity of being heard against such a charge. In the present case no such opportunity has been given to the petitioner employee and therefore the order of deduction is liable to be quashed.

Deduction with consent.—In *Monsukh Gopinath Jadhav* v. *W.M. Bapat*,[1] it was held that there is nothing illegal in the action of the employer or the representative union in arriving at a settlement and the clause in the settlement providing for deduction of certain amount and paying it to the employees' union. Such a settlement does not contravene Section 7 of the Act because this section permits deduction with the consent of the employees.

Section 8. Fines.—Clause (a) of Section 7(2) provides that deduction by way of fine from the wages of an employed person shall be made only in accordance with the provisions of this Act.

Section 8 lays down the general requirements for imposition and deductions of fines. Section 8(1) provides that fines shall be imposed on any employed person in respect of any such acts and omissions on his part as the employer, with the previous approval of the State Government or of the prescribed authority, may have specified by notice under Section 8(2).

A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which the employment is carried on or in the case of person employed upon a railway (otherwise than a factory) at the prescribed place or places. No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.

The total amount of fine which may be imposed in any wage period on any employed person shall not exceed an amount equal to three per cent of the wages payable to him in respect of the wage period. No fine shall be imposed on any employed person who is under the age of fifteen years. No fine imposed on any person shall be recovered from him by instalments or after the expiry of sixty days from the day on which it was imposed. Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed.

All fines and all realizations of the fine shall be recorded in a register to be kept by the person responsible for the payment of wages under Section 3, in such form as may be prescribed. All realizations of fine shall be applied only to such purposes beneficial to the persons employed in the factory or establishments as are approved by the prescribed authority.

Explanation.—When the persons employed upon or in any railway, factory, or industrial or other establishment are part of a staff employed under the same management, all such realization may be credited to a common fund maintained for the staff as a whole, provided that the fund shall be applied only to such purposes as are approved by the prescribed authority.

Section 9. Deductions for absence from duty.—Clause (b) of Section 7(2) authorises deductions for absence from duty. Section 9 of the Act lays down that any such deduction may be made on account of the absence of employed person from the place or places where, by the terms of the employment, he is required to work. It is further provided that such absence may be for the whole or any part of the period during which he is so required to work. An employed person shall be deemed to be absent from

[1] (1982) 1 LLJ 144 (Bombay).

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the place where he is required to work if, although present in such place, he refuses to carry out his work in pursuance of stay-in-strike or for any other cause which is not reasonable in the circumstances. The amount of such deductions must bear to his wages the same proportion as his absence bears to the total within the wage period during which he was by the terms of his employment required to work.

If ten or more workers, acting in concert, absent themselves without due notice, required by the terms of their contract of employment and without reasonable cause, such deductions may include such amount not exceeding his wages for eight days as may by any such terms be due to the employer in lieu of the notice. These provisions are subject to any rules made in this behalf by the State Government. Where the workmen took part in an illegal strike in public utility service under Section 22 of the Industrial Disputes Act, there was no 'reasonable cause' for such strike.[1]

In *G.Y.N. Chainulu and others* v. *The Depot Manager, A.P.S.R.T.C. Amalapuram and another*,[2] the union after submission of failure report by the Conciliation Officer issued notice of strike under Section 22 of the Industrial Disputes Act, 1947. The workmen went on strike for one day. Meanwhile the Government issued a notification declaring the strike as illegal under the Andhra Pradesh Essential Services Maintenance Act, 1971. The management issued a notice under the proviso to Section 9(2) of the Payment of Wages Act to show cause as to why wages should not be deducted. Thereafter the management ordered deduction of 3 days wages which has been challenged in this petition. It was held that once strike is declared as illegal under Section 3 of the Essential Services Maintenance Act, a notice of strike issued under Section 22 of the Industrial Disputes Act is not due notice. The employer has a right to deduct wages in case of absence from duty without due notice and without a reasonable cause. But such absence from duty is made an offence under Section 4 of the Essential Services Maintenance Act. The right given to employer under proviso to Section 9(2) of the Payment of Wages Act is inconsistent with the penal liability created under Section 4 of the Essential Services Maintenance Act. Therefore deduction of wages is without authority of law and without jurisdiction.

In *Prakash Chandra Johari* v. *Indian Overseas Bank and another*,[3] the petitioner who was a godown keeper of the Indian Overseas Bank worked for half an hour on 10 January and four and half hours on 11 January 1979 and marked his attendance. The bank deducted two days wages treating him as absent from duty on both the days. The employees made an application under Section 15(2) and (3) of the Payment of Wages Act on the ground that deduction of 2 days wages was unjustified. After inquiry the Authority constituted under the Payment of Wages Act held that the employee had worked for five hours on two days and therefore deduction for five hours he had worked was illegal and he was entitled for salary for five hours. The employee moved a writ petition claiming to full days salary but the suit was dimissed. Thereafter he preferred special appeal in Rajasthan High Court. Dismissing the appeal it was held that in view of Section 9(1) of the Act an employee is supposed to carry out his duties during work hours and in case he for any reason refuses to work or absents himself during these working periods without permision of the authority competent to permit, his leave of absence is liable for deduction of wages for the period he is absent. It was further made clear that the words, "by the terms of his employment" in Section 9(1) qualifies the words, "absence of an employed person from the place or places where" and not the words "such absence being for the whole or any part of the period during which he is so required to work". Hence the words terms of employment would only refer to place

1. *Management of Jawahar Mills Ltd.* v. *Industrial Tribunal*, AIR 1965 Mad 92.
2. (1989) 2 Lab LJ 81 (AP).
3. (1986) 2 Lab LJ 496 (Raj).

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or places of working of the employee and not the working period. Therefore the bank was justified to have deducted the wages for the part of the day.

In *Kothari (Madras) Ltd.* v. *Second A.J. cum Appellate Authority & others*,[1] the question for consideration related to the validity of deduction of wages of employees who were prevented from attending duty on account of Andhra Bandh. It was held that if the Tribunal finds that an employee was not responsible for absence from duty or he was prevented from attending duty, the Management is not entitled to deduct wages. The Tribunal is also empowered to go into the reasons and record a finding in that regard. In the present case the workmen were prevented from attending duty by the organisers of the bandh. Therefore, the Tribunal has jurisdiction to go into this question.

Section 10. Deduction for damages or loss.—Clause (c) of Section 7(2) authorises deductions for damage to or loss of goods expressly entrusted to the employed persons for custody ; or for loss of money for which he is required to account, where such damage or loss is directly attributable to his neglect or default. Clause (o) of Section 7(2) permits deductions for recovery or losses sustained by a railway administration on account of any rebate or refunds incorrectly granted by the employed person where such loss is directly attributable to his neglect or default.

Section 10(1) provides that any deduction under clause (c) or clause (o) of Section 7(2) shall not exceed the amount of the damage or loss caused to the employer by the neglect or default of the employed person. According to Section 10(1-A) a deduction shall not be made under clause (c) or clause (m) or clause (n) or clause (o) of Section 7(2) until the employed person is given an opportunity of showing cause against the deduction. Any such deduction may be made only in accordance with such procedure as may be prescribed for the purpose. According to Section 10(2) all such deductions and all realizations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under Section 3, in such form as may be prescribed.

Section 11. Deduction for services rendered.—Section 11 provides that any deduction under clause (d) or (e) of Section 7(2) shall not be made from the wages of an employed person unless the house accommodation, amenity or service has been accepted by him as a term of employment or otherwise. Such deduction shall not exceed an amount equivalent to the value of the house accommodation, amenity or service supplied and any deduction under sub-section (e) shall further be subject to such conditions as the State Government may impose.

In *M. Balasundaram* v. *Financial Adviser S. Rly.*,[2] it was held that a condition precedent for the exercise of the power conferred on the employer under Section 11(c) of the Payment of Wages Act is that there should be requisition in writing by the local authority calling upon the employer to deduct the professional tax from the salary or wages of the employee. On 1-1-1975 when Section 11(c) was introduced in the Act by Tamil Nadu State Amendment Act, Section 115-A had not found a place in Madras City Municipal Corporation Act. Consequently the mere introduction of Section 11(c) would not empower the employer to deduct from the wages of its employee the professional tax due to the Corporation of Madras. Section 115-A was introduced in October 1976. Therefore, prior to that date the Corporation had no power to call upon the employer to deduct professional tax.

Section 12. Deduction for recovery of Advance.—According to Section 12, any deduction under clause (f) of Section 7(2) shall be subject to the following conditions :—

1. (1991) 2 Lab LJ 604 (Andhra Pradesh).
2. (1981) 1 LLJ 414 (Mad).

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(i) recovery of an advance of money, given before employment began shall be made from the first payment of wages in respect of a complete wage-period, but no recovery shall be made of any advance given for travelling expenses ;

(ii) recovery of an advance of money given after employment began shall be subject to such conditions as the Government may impose ;

(iii) recovery of advance of wages not already earned shall be subject to any rules made by the State Government regulating the extent to which such loans may be granted and the rate of interest payable thereon.

Section 12-A. Deduction for recovery of loans.—Any deduction under clause (fff) of Section 7(2) as stated above shall be subject to any rules made by the State Government regulating the extent to which such loans may be granted and the rate of interest payable thereon.

Section 13. Deductions for payment to co-operative societies and Insurance schemes.—Section 13 of the Act lays down that any deduction under clause (j) and clause (k) of Section 7(2) shall be subject to such conditions as the State Government may impose.

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CHAPTER III
AUTHORITIES UNDER THE ACT

Section 14. Inspectors.—Section 14 of the Act makes provision for three kinds of Inspectors which are as follows :—

(1) An Inspector of factories appointed under Section 8(1) of the Factories Act shall be an Inspector for the purposes of this Act in respect of all factories within the local limits assigned to him.

(2) In respect of all persons employed upon a railway otherwise than in a factory, to whom this Act applies, the State Government is empowered to appoint Inspector for the purposes of this Act.

(3) The State Government is further empowered to appoint such other persons, as it thinks fit, as Inspectors for the purposes of this Act in respect of persons employed in case of factories and industrial or other establishment as specified by such Government by a Gazette notification. The State Government shall also define the local limits within which such inspectors shall exercise their functions.

Powers of the Inspectors.—Section 14(4) lays down that an Inspector may :—

(a) make such examination and inquiry as he thinks fit in order to ascertain whether the provisions of this Act or rules made thereunder are being observed ;

(b) enter, inspect and search any premises of any railway, factory or industrial or other establishment at any reasonable time for the purposes of carrying out the objects of this Act. They have power to take any assistance which they think necessary for any of the above purposes ;

(c) supervise the payment of wages to persons employed upon any railway or in any factory or industrial or other establishment ;

(d) require by a written order the production at such place, as may be prescribed, of any register or record maintained in pursuance of this Act. He can also take on the spot or otherwise statement of any persons which he considers necessary for carrying out the purposes of this Act ;

(e) seize or take copies of such registers or documents or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by an employer ; and

(f) exercise such other powers as may be prescribed.

But according to sub-section (4) of Section 14 no person shall be compelled to answer any question or make any statement tending to incriminate himself. The provisions of the Code of Criminal Procedure, 1973 shall, so far as may be, apply to any search or seizure under this sub-section as they apply to any search or seizure made under the authority or a warrant issued under Section 94 of the said Code. Every Inspector shall be deemed to be public servant within the meaning of the Indian Penal Code, 1860.

Section 14-A. Facilities to be afforded to Inspectors.—Section 14-A provides that every employer shall afford an Inspector all reasonable facilities for making an entry, inspection, supervision or inquiry under this Act.

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Section 15. Authority to hear claims.—Section 15(1) empowers the State Government to appoint the Authority to hear and decide all claims arising out of deductions from the wages, or delay in payment of the wages of persons employed or paid in that area, including all matters incidental to such claims. The appointment shall be made by a notification in the official Gazette. The area within which such authority shall exercise its jurisdiction shall also be specified by the said Government. The following may be appointed as the authority as aforesaid :

(i) a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Disputes Act, 1947, or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State ; or

(ii) any Commissioner for Workmen's Compensation ; or

(iii) other officer with experience (a) as a Judge of a civil court, or (b) as a Stipendiary Magistrate.

The State Government is further empowered to appoint more than one authority for the same specified area, and where it so appoints it shall, by general or special order, provide for the distribution or allocation of work to be performed by them under this Act.

Meaning of deduction.—In *Union of India* v. *Kameshwar Dubey and others*,[1] the point for consideration by the Court was the difference between "deducted wage" and "delayed wage". It was held that the difference depends upon the intention of the employer. If his intention is to deny the liability to pay the wages or to deny the right of the workmen to receive the same, it would be a case of "wages deducted". But if the employer concedes the liability to pay and does not dispute the workman's right to the same, it would be a case of "delayed payment". The word "deduction" in Section 15 of the Payment of Wages Act is used in a wider sense. It means "to take away" or denying the liability to pay wages. It includes withholding of wages by the employer whether partially or wholly.

Presentation of application.—An application in respect of the following claim can be made to the Authority mentioned above :—

(i) where contrary to the provisions of this Act any deduction has been made from the wages of an employed person ; or

(ii) where contrary to the provisions of this Act, any payment of wages has been delayed, an application may be made by any one of the following :—

(a) employed person himself ; or

(b) any legal practitioner authorised in writing to act on his behalf ; or

(c) any official of a Registered Trade Union authorised in writing to act on his behalf ; or

(d) any Inspector under this Act ; or

(e) any other person acting with the permission of the authority appointed to hear such claims under Section 15(1).

Every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of wages was due to be made, as the case may be, but any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

First proviso to Section 15(2) *ex facei* indicates two alternatives, namely : (i) the date on which deduction from wages was made, or (ii) the date on which the payment

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1. (1988) 2 Lab LJ 302 (Delhi).

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of the wages was due to be made. The first relates to the 'deduction of wages' and the second to the 'wages delayed'. These two expressions do not carry the same meaning. The very fact that two distinct starting points of limitation referable to two distinct concepts, have been stated in the proviso, shows that the Legislature had visualised that the date of deduction of wages and the due date of delayed wages, may not always coincide.

In *D.R. Jerry* v. *Union of India*,[1] the appellant was a Guard in Northern Railway. He was convicted for an offence under Section 509 of the I.P. Code and his conviction was upheld by the High Court. Thereafter the Railway administration dismissed him from service. In appeal by special leave his conviction was set aside by the Supreme Court. Thereafter he filed a writ petition under Article 226 of the Constitution challenging his dismissal order. In pursuance to the order of the Court he was reinstated to his original post. He was further informed that the matter of his wages for the period between the date of dismissal and the date of reinstatement would be treated as leave due. In this case the limitation under the first part of proviso was held to commence from the date on which it was decided to treat the period of dismissal as leave due, which meant leave without pay, and not from the date of dismissal from service or the date of reinstatement.

The question of condonation of delay has to be decided after hearing both the parties and claims application cannot be admitted before that question is decided.[2] Sufficient cause contemplated by the sub-section is not any cause which in the personal opinion of the Authority is sufficient but the sufficiency of cause has to be decided by applying proper legal principles.[3]

In *Jodhpur Central Co-op. Bank Ltd.* v. *Naim Singh and another*,[4] an application was filed under Section 15(2) of the Payment of Wages Act, 1936 claiming overtime wages for working on the days which were declared as holidays under the Negotiable Instruments Act, 1881. It was held that the declaration of public holidays on 31 December, 1984 which was the day for annual checking of the accounts would not mean that it was a holiday for the bank employees. The other two days namely 29th June and 31 December 1985 are the days on which there was no commercial transaction and they are days for closing of the Bank accounts. It was not a holiday for the employees. Therefore employees cannot claim overtime for working on the above 3 days.

In *Laxmi Industrial Corporation* v. *K.K. Tewari & another*,[5] the petitioner served notices on its employees to return the attendance cards alleging that the employees had indulged in rowdyism. Employees without complying with the direction of the management, filed petitions before the Authority under the Act for recovery of wages. Meanwhile management declared a lock-out. The Authority passed *ex-parte* order as the management did not attend inspite of repeated notice. The management instead of filing an appeal filed a writ petition. It was held that the petitioner has deliberately chosen to circumvent the provisions of law by filing writ petition instead of availing the remedy of appeal under Section 17 of the Act. The writ was held not to be maintainable on merit. The amount directed by the Authority to be paid by the employer was to be paid with interest.

In *Indian Dairy Enterpreneurs Agri. Co. Ltd.* v. *G.P. Udawah*,[6] the respondent was employed on June 8, 1973 by the company on a consolidated salary of Rs. 500/- per

1. AIR 1974 SC 130.
2. *Prem Narayan Amritlal Verma* v. *Divisional Traffic Manager, Bhusaval*, (1953) 2.
3. *Sita Ram* v. *Nagrasana*, 56 Bom LR 930.
4. (1979) 1 LLJ 245 (Rajasthan).
5. (1995) 2 LLJ 276 (Raj).
6. (1979) 1 LLJ 245 (Rajasthan).

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month. On December 2, 1975 the respondent submitted a claim under Section 15(2) of the Payment of Wages Act before the Authority under the Act that certain amount was due from the company as wages etc. for the period June 8, 1973 to July 1974. Section 1(6) of the Act was amended with effect from November 12, 1975 whereby the limit for non-application of the Act was raised from 400 to 1000 rupees. It was held that in view of the amended provisions of Section 1(6) the Authority, under the Act, has jurisdiction to entertain and decide the application of the respondent. Further the respondent could file an application under Section 15 at the time and date, when it was actually filed as jurisdiction of the Civil Court was barred by Section 22 of the Act.

In *Karnataka Central Co-operative Bank Ltd.* v. *Karpi*,[1] pending disciplinary action an employee was kept under suspension and was paid one fourth of the basic salary as subsistence allowance. An application was filed under Section 15(2) alleging that he was entitled to full salary and that the payment of one fourth of the basic salary amounted to deduction from wages. It was held that in order to attract Section 15(2) of the Act it must be shown that contrary to the provisions of the Act the deductions have been made from the wages of the employed person. Section 7 of the Act makes it clear that any loss of wages on account of suspension shall not be deemed to be a deduction from wages within the meaning of Section 15(2) of the Act. Subsistence allowance is given for enabling the employee to survive and face the inquiry. Payment of subsistence allowance is not on account of services rendered to the employer and it is not given by way of wages. Subsistence allowance will not amount to wages within the meaning of the Act. Hence subsistence allowance does not amount to any loss of wages or to a deduction from wages.

In *Orissa Police Co-operative Syndicate* v. *Binoy Kumar Bose*,[2] it was held that the Authority under the Payment of Wages Act has no jurisdiction to entertain a claim for payment of overtime wages when the employer disputes his liability to pay such overtime. Payability of overtime is decided by the Labour Court.

In a case where an employee is suspended, removed or dismissed, wages become due to him only when such action is declared void and the employee cannot have cause of action before the date of such declaration. Therefore, in case of a claim for wages in such a case the limitation period would not start before the date from which suspension etc. is declared void.[3]

Procedure.—Section 15(3) lays down the procedure to be followed by the Authority entertaining an application under Section 15(2). The Authority shall hear the applicant and the employer or other persons responsible for payment of wages under Section 3. Thus after giving them an opportunity of being heard and after such further inquiry as may be necessary, the Authority may direct the refund to the employed person, of the amount deducted or the payment of the delayed wages. The authority may also direct payment of such compensation as it thinks fit but not exceeding ten times the amount of wages deducted and in case of delay in payment of wages, not exceeding twenty-five rupees. In case where the amount deducted or the wages delayed are paid before the disposal of the application, the Authority can direct the payment of such compensation as it may think fit but not exceeding twenty-five rupees. Any other penalty to which the employer or the other person responsible for delay or deduction is liable under this Act may be also imposed. That is the direction under sub-section (3) of Section 15 does not prejudice any other penalty to which the employer or other person is liable under this Act.

But no direction for the payment of compensation shall be made in the case of

1. (1987) 1 Lab LJ 179 (Karn).
2. (1979) 2 LLJ 360 (Orissa).
3. *General Manager, N.E. Railway* v. *Surajnath Dubey*, (1980) 2 LLJ 242 (All).

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delayed wages if the Authority is satisfied that the delay was due to—

(a) *bona fide* error or *bona fide* dispute as to amount payable to the employed person ; or

(b) the occurrence of an emergency, or the existence of exceptional circumstances such that the person responsible for the payment of wages was unable, though exercising reasonable diligence, to make prompt payment ; or

(c) the failure of the employed person to apply for, or accept payment.

Section 15(4) lays down that if the Authority hearing the application for claims is satisfied that the application was either malicious or vexatious it can direct the person presenting the application to pay a penalty not exceeding rupees fifty to the employer or other person responsible for the payment of wages.

The payment of compensation for non-payment of salary is within the discretion of the Authority.[1]

If, on the other hand, in any case in which compensation is directed to be paid under Section 15(3) the Authority comes to the conclusion that the applicant should not have been compelled to file a claim application for recovering his dues, it can direct the employer or other person responsible for the payment of wages to pay a sum not exceeding fifty rupees as penalty to the State Government.

Sub-section (4-A) provides that where there is any dispute as to the person being a legal representative of the employer or the person employed, the decision of the Authority on such dispute shall be final. According to Section 15(4-B) any inquiry under Section 15 shall be deemed to be a judicial proceeding within the meaning of Sections 193, 219 and 228 of the Indian Penal Code.

It was held in *General Manager, Western Railway & others* v. *Authority under Payment of Wages Act*[2] that the Authority appointed under the Payment of Wages Act, 1936 is bound to exercise its jurisdiction in a judicial manner. It is required to comply with the principles of natural justice in asmuch as it has to offer an opportunity of being heard to the applicant and the employer or any other persons responsible for payment of wages. It may make such inquiry as it may consider necessary, for the purpose of deciding such application. Inquiry before the Authority has to be treated as judicial proceeding by virtue of Section 15(4-B) of the Act. Thus an order passed by the Authority cannot be treated as an 'order' for the purpose of Section 19(1) of the Administrative Tribunals Act, 1985. It is not possible to accept the proposition that against an order passed under the Payment of Wages Act, an appeal will not lie to the District Court but an application will lie before the Administrative Tribunal.

Recovery of amount.—Section 15(5) lays down that any amount directed to be paid under Section 15 may be recovered—

(a) if the Authority is a Magistrate, by the Authority, as if it were a fine imposed by him as Magistrate ; and

(b) if the Authority is not a Magistrate, by any Magistrate to whom the Authority made application for recovery of the amount, as if it were a fine imposed by such Magistrate.

In *Krishan Prasad Gupta* v. *Controller, Printing & Stationary*[3] an employee of the respondent filed an application under Section 15 of Payment of Wages Act for recovery of amount illegally withheld and certain unauthorised deduction which were made from his wages. An appeal was filed by the employer before the District Judge against the

1. *Sambunath Battachargee* v. *Orient Paper Mills*, (1995) I LLJ 159 (Orissa).
2. (1994) I LLJ 1066 (Raj).
3. (1996) I LLJ 396 (SC).

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order of the Prescribed Authority and later on this appeal was transferred to the Administrative Tribunal. It was held that appeal pending under Section 17 of the Payment of Wages Act before the District Judge cannot be transferred to Administrative Tribunal under Section 29 of the Administrative Tribunals Act, 1985.

Scope of jurisdiction under Section 15.—The scope of jurisdiction which the Authority under Section 15 exercises in deciding claims is limited. Where complicated questions of fact or law are raised and a prolonged inquiry becomes necessary, the Payment of Wages Authority would have no jurisdiction to the claim before it.[1] In *A.R. Sarin* v. *B.C. Patil*,[2] Mr. Chagla, C.J. observed :—

> "The jurisdiction of the Authority really is to determine the terms of the contract in so far as they relate to the payment of wages and in so far as he has to decide the liability of the employer to pay wages under the terms of the contract. But that jurisdiction does not extend to determine the questions as to whether the contract has been terminated as alleged by the employer or the contract is still subsisting as alleged by the servant".

It was held in *Mohammad Ayub* v. *M/s. Mohammad & Sons*[3] that the jurisdiction of Authority appointed under Section 15 of the Act is limited and it cannot determine complicated questions of law and fact. The Authority has no jurisdiction to decide the question relating to termination of employment and reinstatement. The Authority cannot decide whether employer-employee relationship exists or not as this question cannot be said to be incidental to the claims that can be determined under the Act.

The doctrine of *factum valet* cannot be applied in the sphere of industrial establishment where the conditions of employment are either contractual or statutory in so far as a contract has been supplemented by legislation by the welfare State.[4]

In *A.V.D. Costa* v. *B.C. Patel*,[5] the Supreme Court while considering the jurisdiction of the Authority under Section 15 has observed as follows :—

> "The Authority has the jurisdiction to decide what actually the terms of the contract between the parties were, that is to say, to determine the actual wages, but the Authority has no jurisdiction to determine the question of potential wages".

The Payment of Wages Authority cannot decide what the wages should be. On receipt of any application for claims the Authority shall call upon the employer by a notice to appear before him on the specified date together with all relevant documents and witnesses, if any. The Authority shall also inform the applicant of the date so specified. If the employer or his representative fails to appear on the specified date, the Authority may proceed to hear and determine the application *ex-parte*. If the applicant fails to appear on the specified date, the Authority may dismiss the application. When an application has been so dismissed by the Authority, an application for setting aside that order and rehear the cause has to be made within one month from the date of dismissal.[6] A notice of any such application is to be served on the other side also. If after hearing both the parties the Authority is satisfied that the applicant could not appear for good reasons, the original application will be reheard.

The claims which can be decided by the Authority under Section 15 are claims arising out of deductions or delay made in payment of wages. The jurisdiction of the Authority in respect of these matters is exclusive. The Authority can also determine what the terms of contract between the parties are. Where the terms of contract are

1. *D.P. Kelkar* v. *Ambadas*, AIR 1971 Bom 124.
2. (1951) 2 LLJ 183.
3. (1995) 1 LLJ 978 (Raj).
4. *Imperial Tobacco Co.* v. *State*, AIR 1971 Cal 109.
5. (1955) 1 LLJ 363.
6. Payment of Wages (Procedure) Rules, 1937, Rule 8.

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admitted and the only dispute is whether or not a particular employee falls within one category or another that would be incidental to the decision of the main question as to what the terms of the contract are.[1] Similarly where the terms of a contract are admitted and the only point in dispute is which of the two subsisting contracts applies to the particular employees in question, the Authority has jurisdiction to decide the same.[2]

In *General Manager, N.E. Rly. and others* v. *Shri Pat and others*,[3] it was held that the Authority created under Section 15(1) of the Payment of Wages Act is to ensure payment of wages in particular form and at regular intervals without any unauthorised deductions. Special matters and disputes are entrusted to the Authority for adjudication and the Authority has no jurisdiction to decide upon the validity of termination of service nor does the Authority has the right to decide about the claim of retrenchment relief or benefit. The various special features of the Payment of Wages Act leave no room to doubt that the Prescribed Authority is not a Court placed in the hierarchy of Civil Courts or amenable to the High Court's revisional jurisdiction. Consequently the jurisidction of the Prescribed Authority is not ousted by the provisions of the Administrative Tribunal Act.

Similarly it has been held in *Kanayannur Service Co-operative Society Ltd.* v. *V. Sarakutty*,[4] that the jurisdiction of the Prescribed Authority was not ousted by Kerala Co-operative Societies Act, 1969. In this case the respondent was an employee of the petitioner Society and she was kept out of employment for sometimes for which she claimed wages. The Authority under the Payment of Wages Act has jurisdiction to decide the question as to whether an employee was entitled to claim delayed or unpaid wages. It was further held that notwithstanding the provisions of Section 18 of the Payment of Wages Act which confers on Authorities under the Act limited powers of Civil Court in some matters and deem such Authorities as Civil Courts for certain purposes, the authorities under the said Act are not Courts. Hence exclusion of jurisdiction under the Kerala Co-operative Societies Act will not be operative to deny jurisdiction to such Authorities.

In *Express Newspapers Private Ltd.* v. *Michel Marks*,[5] workers resorted to strike. A notice was issued by the management that if the workers did not return to work by a certain date they will be deemed to have abandoned employment and their names will be removed from muster rolls. The names of some workmen were actually removed from that date. The Standing Orders provided for payment of compensation in case of termination of service by the employer. It was held that removal of names amounted to termination of service without notice and the workmen were entitled to compensation.

In *Ganeshi* v. *District Magistrate*,[6] a dismissed railway servant was reinstated in service and while reinstating the Railway Authority concerned passed an order that the period for which the railway servant was absent from work should be treated as leave without pay and that he would not be entitled to any payment for such period. The railway servant applied under Section 15 for the recovery of wages for the same period. It was held that the Railway Authority which passed the impugned order fell within the description of the competent authority under Section 7(2)(h) of the Payment of Wages Act, 1936, and therefore there was no ause of action for the claim made by the reinstated railway servant. Claims for recovery of wages can be validly made under Section 15(2) and awarded under Section 15(3) only where it is shown that the

1. *Shri Ambica Mills Co. Ltd.* v. *S.B. Bhatt*, AIR 1961 SC 970.
2. *Ibid.*
3. (1987) 2 Lab LJ 377 (All).
4. (1987) 2 Lab LJ 498 (Kerala).
5. AIR 1963 SC 1141.
6. AIR 1982 SC 356.

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impugned deduction is not authorised or justified by Section 7 of the Act.[1]

In *Sujana Ram* v. *Authority under Payment of Wages Act & others*,[2] the petitioner had made an application to the prescribed Authority on April 23, 1982 regarding his claim for salary for the period September 2, 1980 to December 28, 1981. He had also requested for condonation of delay. In fact the employee made a complaint to Labour Inspector on Feb 24, 1982 and he was advised by the Inspector vide his letter dated July 17, 1982 to file a case for payment of wages. The employee also produced a letter dated 25 June, 1981 written by the employer in response to his letter of June 15, 1981 in which the liability to make payment of his wages was admitted. The application of the employee was rejected by the Prescribed Authority as time barred vide his order dated March 7, 1984. It was held by the Allahabad High Court that the Authority has not considered the oral and documentary evidence filed by the employee and the documents filed by the employee have not been accepted on the ground that the same have not been proved. The Authority had not considered that the strict rule of Evidence Act is not applicable to the Proceedings under the Payment of Wages Act. There was no delay on the part of the employee and the Authority has excluded from consideration the material documentary evidence produced by the employee in support of his case. Non-consideration of material evidence or excluding the material evidence from consideration on illegal grounds renders the findings recorded by the Authority to be illegal and perverse. The Authority did not even consider the fact that the claim was not barred by time. It is open to the Authority to split up a composite application into two parts : (i) claim which is within time, and (ii) claim which is not within time. Payment of Wages Act, 1936 is a beneficiary legislation and the question of condonation of delay is to be considered liberally in order to advance the cause of low paid employee.

So long as an award under the Industrial Disputes Act stands and is not terminated under Section 19(6) of the Act and so long as there is no proof that there has been a change in the conditions of service after the award necessitating reconsideration of the matter, the claim of the workers for delayed or deducted wages under Section 15(2) of the Payment of Wages Act cannot be entertained and decided by the Authority, when the workers have all along been paid in accordance with the award.[3]

In *Abdul Waheed* v. *Authority, Payment of Wages Act, Nagour and others*,[4] Mohd. Ayub, respondent no. 2 claiming himself an employee of M/s. Mohd. & Sons, filed a claim for recovery of alleged illegal deduction of his Wages, before the Authority under the Payment of Wages Act, Nagour. He impleaded Yusuf respondent No. 3 as defendant describing him as partner of M/s. Mohd. & Sons. Having come to know about the proceedings Abdul Waheed another partner and Receiver appointed by the Court applied for being impleaded in the claim petition. The said application has been rejected by the Prescribed Authority on the ground that application raised complicated questions of law and fact about relationship between claimant Mohd. Ayub and Mohd. Yusuf which the Authority has no juisdiction to decide. Hence a wit petition was filed. Ealier there was a dispute between the partners of the firm, Yusuf, (father-in-law of Mohd. Ayub) instituted a suit for rendition of accounts against other partners—Abdul Waheed and Mohd. Rafiq s/o Yusuf and brother in law of Mohd. Ayub. On January 5, 1982 Abdul Waheed present petitioner was appointed Receiver of the firm by the Court. It was held that the Authority under the Payment of Wages Act, has no jurisdiction to entertain and decide a claim which raised complicated issues of law and fact.

A claim for compensation for full period of service under Section 25-FFF which

1. AIR 1982 SC 356.
2. (1995) 2 Lab LJ 524 (All).
3. *Bombay Gas Co. Ltd. v. Shridharbhau Parah*, AIR 1962 SC 1196.
4. (1995) 2 Lab LJ 1079 (Raj).

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is denied by the employer on the ground that it was defeated by the proviso to that section is not a claim made on account of any deductions of wages or delayed wages etc.[1] It does not attract Section 15(2) of the Payment of Wages Act. The claim made is an unliquidated or indefinite amount as is contemplated in Section 33-C (2) of the Industrial Disputes Act, viewed from the standpoint either of closure or retrenchment. The proper forum, therefore, is the Labour Court under Section 33-C (2) of the Industrial Disputes Act.[2]

In *Dharmapuri District Co-op. Sugar Mills Ltd.* v. *P. Vishwanathan & others*,[3] the respondent P. Viswanathan was an employee of the appellant society and was promoted to a higher grade but was not paid the emoluments due under the said grade. It was held that a careful perusal of Section 15 of Payment of Wages Act shows that it provides for all claims arising out of deductions from the wages or delay in payment of wages. Therefore in all cases, as in the present case, where the employer refuses to pay the wages for promotion grade, there is no reason as to why Section 33-C (2) of the Industrial Disputes Act cannot be invoked. Even in cases which are covered by Section 15 of the Payment of Wages Act, there seems to be absolutely no bar to deal with a claim of an employee under Section 33-C(2) of the Industrial Disputes Act.

In *Delhi Transport Corporation* v. *D.D. Gupta and another*,[4] it was questioned whether the Labour Court can go into the validity of suspension/termination in a proceeding under Section 33-C (2). It was held that in a computation proceeding under Section 33-C of the Industrial Disputes Act or Section 15 of the Payment of Wages Act an enquiry by the Labour Court regarding the validity of suspension/termination will depend on the circumstances of the case. If the suspension/termination is *void ab initio* the claim of workman for computation or the assumption that he continues to be in service all through, there being no valid order of suspension/termination, can be preferred and the enquiry into the validity of the suspension/termination would become incidental to the main question of computation.

In *Sulekha Works Limited* v. *Baren Das*,[5] an employee of the appellant Company had not accounted for certain sum of money and therefore, deduction was made from the employee's wages. The employee filed a suit seeking permanent injunction against the employer restraining him from making deductions. It was held that relief in respect of deductions made in violation of the provisions of the Payment of Wages Act may be sought by the employee under Section 15 of the Act. The jurisdiction of Civil Court to grant injunction is limited to cases in which there is a right at law to be pursued in such court. Since the jurisdiction of Civil Court in respect of unauthorised deduction is barred by Section 22(d) no injunction can be granted.

In *Mandegam Radhakrishna Reddy* v. *Bharathi Velu Bus Service*,[6] the question considered was whether the remedy under Section 33-C (2) of the Industrial Disputes Act, 1947 is barred by the provisions of Section 15 of the Payment of Wages Act, 1936. It was held that Section 22 of the Payment of Wages Act bars only entertainment of a suit by a Civil Court for the recovery of wages. There is no express provision either in Section 22 or other provisions in the Payment of Wages Act, 1936 prohibiting an employee from seeking a remedy available to him under Section 33-C (2) of the Industrial Disputes Act for recovery of wages. Remedy under Section 33-C (2) of the Industrial Disputes Act is wider and more favourable to the workmen than the remedy

1. *K. Venkatahalam* v. *Melby D'Cruz*, AIR 1971 Ker 190.
2. *Ibid.*
3. (1994) 2 LLJ 359 (Madras).
4. (1984) 2 LLJ 79.
5. (1983) 2 LLJ 501 (Cal).
6. (1986) 1 Lab LJ 336 (AP).

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under Section 15 of the Payment of Wages Act, 1936. Even a claim barred by the time under Section 15 of the Payment of Wages Act can be entertained under Section 33-C(2) of the Industrial Disputes Act, 1947. The remedies under the Payment of Wages Act and the Industrial Disputes Act are independent and alternative and one does not exclude the other.[1] The principle "*Generalia Specialibus non-derogant*" will not be applicable as each one of the Act is a special enactment in its own sphere and one cannot be said to be general in nature *vis-a-vis* the other.

Section 16. Single application in respect of claims from unpaid group.—Section 26(1) explains the expression "unpaid group". Employed persons are said to belong to the same unpaid group if :—

(i) they are born on the same establishment ; and

(ii) deductions have been made from their wages in contravention of the Act for the same cause and during the same wage period or periods, or

(iii) their wages for the same wage periods have remained unpaid after the day fixed by Section 5.

Section 16(2) lays down that a single application may be presented under Section 15 on behalf or in respect of any number of employed persons belonging to the same unpaid group, and in such case every person on whose behalf such application is presented may be awarded maximum compensation to the extent specified in Section 15(3) of the Act.

Section 16(3) lays down that if several applications are pending, presented under Section 15 by employees belonging to the same unpaid group, the Authority can deal with them as if it was a single application by an unpaid group.

Section 17. Appeal.—Section 17 of the Act provides that an appeal may be preferred from the following orders or directions of the Authority :—

(i) an order directing the employer or the persons responsible for payment of wages, to refund the deductions wrongfully made or to pay the delayed wages ;

(ii) an order directing payment of compensation to the employee under Section 15(3) ;

(iii) an order imposing penalty whether on the employee or the employer under Section 15(4).

An appeal under this section can be made within thirty days of the date on which the order or direction was made in Presidency town before the Court of Small Causes and elsewhere before the District Court within whose jurisdiction the industrial establishment is situated.

An appeal may be filed by the employer or other person responsible for the payment of wages under Section 3, if—

(i) the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees ; or

(ii) such direction has the effect of imposing on the employer or the other person a financial liability exceeding one thousand rupees.

An appeal may be filed by an employed person or any legal practitioner or any official of a registered Trade Union authorised in writing to act on his behalf or any Inspector under this Act, or any other person permitted by the authority to make an application under Section 15(2), if the total amount of wages claimed to have been withheld :

(i) from the employed person exceeds twenty rupees ; or

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1. *See* also *Krishan Lal* v. *Labour Court Jalandhar and another*, (1987) 2 Lab LJ 110 (P & H).

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(ii) from the unpaid group to which the employed person belongs or belonged exceeds fifty rupees.

An appeal may also be preferred by any person directed to pay a penalty under Section 15(4) of the Act.

No appeal shall lie as aforesaid unless the memorandum of appeal is accompanied by a certificate by the authority to the effect that the appellant has deposited the amount payable under the direction appealed against.

Section 17(2) lays down that any order dismissing either wholly or in part an application made under Section 15(2) or a direction made under Section 15(3) or Section 15(4) shall be final unless an appeal under Section 17(1) is preferred against any such order or direction. Section 17(3) provides that where an employer prefers an appeal under this section, the authority against whose decision the appeal is filed may, pending the decision of the appeal, withhold payment of any sum in deposit with it. Where a direction to withhold payment of such sum is made by the Court of Appeal such authority shall, and in other cases, may withhold payment of any sum so deposited with it.

Section 17(4) lays down that the Court of Appeal as referred to in Section 17(1) may in its discretion, submit any question of law for the decision of the High Court. Where any such question is so referred, the Court of Appeal shall decide the matter in conformity with the decision of the High Court.

In *Hajari Ram* v. *Khadi Mandir, Bikaner*,[1] an application under Section 15(2) was filed after the expiry of the limitation period. The application for condonation of delay was granted by the Authority. It was held that the appellate court can decide the correctness of the order of condonation of delay. It was further pointed out that for condoning delay, reasons are necessary and such reasons are to be supported by evidence. If the Authority while condoning the delay in making an application, fails to record the reasons for condonation, the order granting condonation is liable to be set aside. In *Laxman Pandu* v. *Chief Mechanical Engineer, W. Rly.*[2] it was held that the employer or the other person under Section 17(1)(a) may file an appeal if the total sum directed to be paid to a single worker by way of wages and compensation exceeds rupees three hundred ; there is no right of appeal if the sum exceeding rupees three hundred is directed to be paid collectively to an unpaid group of workers. An appeal may also be preferred where an application for claim is dismissed on merits, that is where he is held not to be entitled to the amount as claimed by him. The employee has a right of appeal provided that claims application is entertained by the authority, but a direction on the merits of the applications is refused.[3] But where the application is dismissed not on merits but on the ground that the authority has no jurisdiction to entertain the application there is no refusal to give direction and therefore there is no right of appeal against such an order.

It was held in *Daru* v. *Manager, Ahmedabad Spinning and Manufacturing Co. Ltd.*[4] that Section 17(1) provides a right of appeal to the District Court and there is no further right of appeal under the Act. Therefore only a revision application may be made to the High Court under Section 115 of the Civil Procedure Code ; but in the opinion of the Bombay High Court it would be better if the decisions under the Payment of

1. AIR 1979 Raj 76. However in *Prem Narayan Varma* v. *D.T.M. Bhusawal*, AIR 1954 Bom 78, it was held that no appeal can be filed against an order of the Authority condoning the delay in filing the application for claims.
2. (1955) 2 LLJ 5.
3. *C.S. Lal* v. *Shaikh Badshah*, 56 Bom LR 895.
4. (1955) 1 LLJ 555.

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Wages Act are challenged under Article 227 of the Constitution.[1]

In *Hajari Ram* v. *Kahdi Mandir, Bikaner*,[2] an appeal under Section 17 was filed. The amount to be deposited in view of the direction under Section 15(3) was deposited by a cheque before the time for an appeal had expired. The Authority issued the certificate on the same date on which the cheque was produced. The Authority, by treating the cheque as valid tender, stated in the certificate that the amount has been deposited in pursuance of the direction issued by it. The certificate was filed along with the memo of appeal. However the cheque was encashed after the period of limitation for filing the appeal had expired. It was held that this was sufficient compliance with the provisions of Section 17(1-A). It could not be said that the certificate could only be issued by the Authority after encashment of the cheque.

Section 17-A. Conditional attachment of property of employer or other person responsible for payment of wages.—Section 17-A of the Act makes provisions for conditional attachment of so much of the property of the employer or other person responsible for payment of wages as is, in the opinion of the authority or the court, sufficient to satisfy the amount which may be payable under the direction. The conditional attachment may be made in the following circumstances :—

(a) when the application under Section 15(2) or appeal under Section 17 has been filed by the employed person or any official of a registered Trade Union authorised in writing to act on his behalf, or any legal practitioner or any Inspector or any other person permitted by the authority under Section 15(2) of the Act ;

(b) when the authority or the Court is satisfied that the employer or other person responsible for the payment of wages under Section 3 is likely to evade payment of any amount that may be directed to be paid under Section 15 or Section 17 ;

(c) when the authority or the Court is of the opinion that the ends of justice would be defeated by the delay.

Where under the circumstances mentioned above an order of attachment is to be passed the employer or the person responsible for the payment of wages shall be given an opportunity of being heard.

Section 17-A (2) lays down that the provisions of the Code of Civil Procedure, 1908, relating to attachment before judgment under that Code shall, so far as may be, apply to any order for attachment under sub-section (1). Under the provisions of the Civil Procedure Code property may be attached pending disposal of the application or an appeal unless the employer or other person deposits an amount sufficient to satisfy the claim or gives security for a like amount.

Section 18. Power of authorities appointed under Section 15.—Section 18 of the Act lays down that every Authority appointed under Section 15 of the Act shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purposes of :—

(a) taking evidence ;

(b) enforcing the attendance of witnesses ; and

(c) compelling the production of documents.

It is further provided that any such Authority shall be deemed to be a Civil Court for all purposes of Section 196 and of Chapter 35 of the Code of Criminal Procedure, 1898.

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1. *D.C.M. Agaramgam Digital Preservation Foundation Chandigarh Funding by IKS MoE 2025 Grant*
2. AIR 1979 Raj 76.

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In *Kantilal R. Shah* v. *State of Gujarat*,[1] certain applications were filed under the Payment of Wages Act against the petitioner mill and its Managing Director. The Kanti Cotton Mills Private Ltd., was declared as a relief undertaking under the Bombay Relief Undertaking (Special Provisions) Act, 1958. The court was requested to stay the proceedings in all the matters till further orders of Government. These applications were rejected by the Authority. Hence revision petitions were filed. It was held that under the Relief Undertaking Act any proceedings pending before any court, Tribunal, officer or authority could be stayed. Therefore the Authority under the Payment of Wages Act should have stayed the proceedings as long as the undertaking would remain covered under the Relief Undertakings Act.

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1. (1984) 1 LLJ 99 (Gujarat).

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CHAPTER VI
MISCELLANEOUS

Section 13-A. Maintenance of registers and records.—Section 13-A (1) lays down that every employer shall maintain such registers and records and in such form as may be prescribed. Any such register or record shall contain the following particulars :—

(i) particulars of persons employed by him ;
(ii) the work performed by the persons employed ;
(iii) the wages paid to the persons employed ;
(iv) the deductions made from the wages of the persons employed ;
(v) receipts given by the persons employed ; and
(vi) such other particulars.

Sub-section (2) of Section 13-A provides that every register and record required to be maintained under this section shall, for the purposes of this Act be preserved for a period of three years after the date of the last entry made therein.

Section 20. Penalty for offences under the Act.—Section 20(1) of the Act makes contravention of the following provisions of the Act, by any person responsible for the payment of wages to an employed person, punishable with fine which shall not be less than two hundred rupees but which may extend to one thousand rupees :

(i) Section 5 [except sub-section (4) thereof] ;
(ii) Section 7 and Section 8 [except sub-section (2) thereof] ;
(iii) Section 9 and Section 10 [except sub-section (2) thereof] ; and
(iv) Sections 11 and 13.

Sub-section (2) of Section 20 makes contravention of the following provisions by any person punishable with fine which may extend to five hundred rupees :—

(i) Section 4, (ii) Section 5(4), (iii) Section 6, (iv) Section 8(8), (v) Section 10(2) or (vi) Section 25 ;

Section 20(3) provides that any person, required under this Act to maintain any records or registers or to furnish any information or return, shall in case of the following lapses, be punishable for each such offence with fine which shall not be less than two hundred rupees, but which may extend to one thousand rupees :

(a) failure to maintain such register or record ; or
(b) wilful refusal or neglect without lawful cause to furnish such information or return ; or
(c) wilfully furnishing or causing to be furnished any information or return which he knows to be false ; or
(d) refusal to answer or wilfully giving a false answer to any question necessary for obtaining any information required to be furnished under this Act.

The following offences shall be punishable with fine which shall not be less than two hundred rupees but which may extend to one thousand rupees under Section 20(4) of the Act :

(a) wilfully obstructing an Inspector in the discharge of his duties under this Act ; or
(b) refusal or wilfully neglecting to afford an Inspector any reasonable facility

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for making any entry, inspection, examination, supervision or inquiry authorised by or under this Act in relation to any railway, factory or industrial or other establishment ; or

(c) wilful refusal to produce on demand of an Inspector any register or other document kept in pursuance of this Act ; or

(d) preventing or attempting to prevent or doing anything which he has any reason to believe is likely to prevent any person from appearing before or being examined by an Inspector acting in pursuance of his duties under this Act.

Section 20(5) lays down that if any person who has been convicted of any offence punishable under this Act, is again guilty of an offence involving contravention of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which shall not be less than one month but which may extend to six months and with fine which shall not be less than five hundred rupees but which may extend to three thousand rupees. But for the purposes of this sub-section no cognizance shall be taken of any conviction made more than two years before the date on which the commission of the offence which is being punished came to the knowledge of the Inspector.

According to Section 20(6), if any person fails or wilfully neglects to pay the wages of any employed person by the date fixed by the authority in this behalf, he shall, without prejudice to any other action that may be taken against him, be punishable with additional fine, which may extend to one hundred rupees for each day for which such failure or neglect continues.

Section 21. Procedure in trial of offences.—Section 21 provides that before any court shall take cognizance of a complaint against any person for an offence under Section 20(1), the following conditions must be fulfilled :

(i) any application in respect of the facts constituting the offence has been presented under Section 15 ;

(ii) the application must have been granted wholly or in part ; and

(iii) the authority empowered under Section 15 or the appellate court granting the application must have sanctioned the making of the complaint for such offence.

Section 21(2) further provides that, before sanctioning the making of a complaint against any person for an offence under Section 20(1) the authority empowered under Section 15 or the appellate court, as the case may be, shall give such person an opportunity of showing cause against the granting of such sanction. The sanction shall not be granted if such person satisfies the authority or court that his default was due to—

(a) a *bona fide* error or *bona fide* dispute as to the amount payable to the employed person, or

(b) the occurrence of an emergency or the existence of exceptional circumstances, such that the person responsible for the payment of the wages was unable, though exercising reasonable diligence to make prompt payment ; or

(c) the failure of the employed person to apply for or accept payment.

Section 21(3) lays down that no court shall take cognizance of a contravention of Section 4 or of Section 6 or of contravention of any rule made under Section 26 except on a complaint made by or with the sanction of an Inspector under this Act. It is further provided that no court shall take cognizance of any offence punishable under Section 20(3) or 20(4) except on a complaint made by or with the sanction of an Inspector under

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this Act.

Section 21(4) provides that in imposing any fine for an offence under Section 20(1), the court shall take into consideration the amount of any compensation already awarded against the accused in any proceedings taken under Section 15.

Section 22. Bar of suit.—Section 22 provides that a suit for the recovery of wages or of any wrongful deduction from wages shall not be entertained by any court under the following circumstances :—

(a) the amount claimed forms the subject of an application under Section 15 which has been presented by the plaintiff and which is pending before the authority appointed under this section or of an appeal under Section 17 ; or

(b) the amount claimed has formed the subject of a direction under Section 15 in favour of the plaintiff ; or

(c) the amount claimed has been adjudged in any proceeding under Section 15, not to be owed to the plaintiff ; or

(d) the amount claimed could have been recovered by an application under Section 15.

It was held in *Bhagwat Rai* v. *Union of India*,[1] that "the jurisdiction to the Civil Court could not be revived by the omission of the workman to make an application putting therein claims arising out of deductions, from the wages or delay in payment of wages, within the time allowed by law". Section 22(d) of the Payment of Wages Act, 1936, only prevents a suit for wages. It does not exclude the jurisdiction of a Tribunal set up under Section 7 of the Industrial Disputes Act, 1947 to adjudicate upon a claim for payment of wages.[2] It does not exclude any other proceeding permitted by law to enforce payment.[3]

In *Simplax Manufacturing Co.* v. *Allauddin*,[4] it has been held that "a Civil Court is not barred by Section 22 of the Payment of Wages Act from trying a suit in which the plaintiff is claiming a sum of money alleged to be due in lieu of a notice after dismissal from employment where the claim is entirely denied under Section 15 of the Act". It, therefore, seems reasonable that any *bona fide* disputes as to the amount payable are to be tried by the Civil Courts for otherwise there would be no authority capable of making an order for payment when the amount is in fact due. While an application under the Payment of Wages Act regarding recovery of arrears of pay, provident fund, gratuity, bonus, etc., was pending a suit in a civil court is not barred for that reason only.[5]

It was held in *Jaipur Development Authority* v. *Labour Court and others*,[6] that Section 22 of the Payment of Wages Act excludes the jurisdiction of the court to entertain a suit in respect of the matter entrusted to the jurisdiction of the Authority constituted under Section 15 of the Payment of Wages Act. The Labour Court cannot be regarded as a court of general jurisdiction. Section 22 bars institution of a suit. It does not bar the institution of an application for recovery of wages under Section 33-C (2) of the Industrial Disputes Act. The Labour Court is not a Civil Court. As such its jurisdiction to entertain an application under Section 33-C(2) of the Industrial Disputes Act for payment of wages to a workman is not barred by virtue of the provisions of Section 22 of the Payment of Wages Act.

Section 22-A. Protection of action taken in good faith.—A suit, prosecution,

1. 1953, DLR Nag 36.
2. *Shamnagore Jute Factory Ltd.* v. *S.M. Modak*, AIR 1949 FC 150.
3. *Ibid.*
4. AIR 1945 Lah 1906.
5. *M.S.R.T. Corp.* v. *B.H. Ind.* AIR 1977 Bom 1.
6. (1991) 2 Lab LJ 133 (Raj).

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or other legal proceeding shall not lie against the Government or any officer of the Government for anything which is in good faith done or intended to be done under this Act.

Section 23. Contracting out.—Any contract or agreement, whether made before or after the commencement of this Act, whereby an employed person relinquishes any right conferred by this Act shall be null and void in so far as it purports to deprive him of such right. Where the employees of a company claimed bonus for work done during the war period, the grant of annual bonus equivalent to one month's pay and the introduction of profit sharing scheme, it was held that "the scheme of the Act is to prevent employees from delaying payment of the amount earned by the workmen beyond the period mentioned in the Act. But this is assumed that the payment of an ascertained sum has become due and that the employer has delayed payment. Therefore, these claims were not claim for "wages" within the meaning of this Act as the claims were not for an ascertained sum and a stipulation to pay such bonus would not, therefore, offend the provisions of Section 20 or 23 of the Act. Section 23 only prevents an employee from contracting away the rights which are given to him by the Act and that it does not prevent him from entering into an agreement advantageous or beneficial to him".[1]

In *Dinaram Chutiya* v. *Divisional Manager*,[2] the employer revised the wage structure of his workmen by increasing the basic wages and dearness allowance hitherto payable and deducting servant allowance but with the result that the total wages payable to workmen before revisions were not reduced. It was held that the mere deduction of servant allowance either partial or whole cannot be said to contravene Section 23 of the Act. It was further observed that a contract validly entered into between the employer and the employee by which the contract of service has been modified as regards the amount of wages is not hit by Section 23 of this Act. This Act confers the following rights :

(i) to receive the wages ;
(ii) to receive them at the proper time specified in the Act ;
(iii) to receive them without deduction.

The scheme of the Act in no sense appears to destroy the freedom of the parties to substitute one contract by another when following the machinery prescribed by the Act. The employer and the employees may, by mutual agreement, change the scale of wages, and such agreement does not amount to contracting out within the purview of Section 23 of the Act.[3] A genuine and valid compromise made between an employee and an employer in connection with disputes between them as regards the true and correct amounts of illegal deductions payable to the employee cannot be held to be relinquishment of rights conferred by the Act.[4] Such an agreement is not null and void.

In *Karnataka Bank Employees Association* v. *Commissioner of Labour and others*,[5] there was an agreement dated 4.11.71 under which the management of certain banks were deducting the union subscription from the salary of member employees and by order dated 24.8.75 and 19.11.75, the Labour Commissioner had directed the managements to discontinue the deduction. These orders were challenged.

It was held that Section 23 of the Payment of Wages Act does not prevent the employee from entering into an agreement advantageous or beneficial to him. Deduction

1. *F.W. Heilgers Co.* v. *Nagesh Chandra Chakrawarti*, AIR 1949 FC 142.
2. AIR 1958 Assam 77.
3. *Madanlal Tiwari* v. *Superintendent and Manager, Bengal, Nagpur Cotton Mills Ltd.*, AIR 1964 MP 297.
4. *R.M.A. Singh* v. *B.A.E. Bote*, AIR 1971 Bom 31.
5. (1980) I LLJ 97 (Karnataka).

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is for the betterment of the employees. It is common knowledge that the workers organise themselves by forming unions with a view to bargain collectively with the employer on various matters touching their service conditions, employments, bonus, etc. It is, therefore, necessary for those unions to be self-supporting by taking a subscription from their members only. From this stand point a nominal deduction of two rupees from the wages of the members of the association cannot be characterised as a deduction against the interest of the members of the assocation. Deduction in these circumstances under an agreement between the employer and the employee is valid and is not hit by Section 23 of the Act.

Section 24. Application of Act to railways, mines and oil fields.—The powers by this Act conferred upon the State Government shall in relation to railways, air transport services, mines and oil fields, be powers of the Central Government.

Section 25. Display by notice of abstract of the Act.—The person responsible for the payment of wages to person employed in a factory or an industrial or other establishment, shall cause to be displayed in such factory or industrial or other establishment, a notice containing such abstracts of this Act and of the rules made thereunder in English and in the language of the majority of the persons employed in the factory or industrial or other establishment, as may be prescribed.

Section 25-A. Payment of undisbursed wages in cases of death of employed person.—(1) Subject to the other provisions of the Act, all amounts payable to an employed person as wages shall, if such amounts could not or cannot be paid on account of his death before payment or on account of his whereabouts not being known :

(a) be paid to the person nominated by him in this behalf in accordance with the rule made under this Act ; or

(b) where no such nomination has been made or where for any reasons such amounts cannot be paid to the person so nominated, be deposited with the prescribed authority who shall deal with the amounts so deposited in such manner as may be prescribed.

(2) Where, in accordance with the provisions of sub-section (1) all amounts payable to an employed person as wages :—

(a) are paid by the employer with the person nominated by the employed person, or

(b) are deposited by the employer with the prescribed authority, the employer shall be discharged of his liability to pay those wages.

Section 26. Rule-making power.—(1) The State Government may make rules to regulate the procedure to be followed by the authorities and Courts referred to in Sections 15 and 17.

(2) The State Government may, by notification in the Official Gazette, make rules for the purpose of carrying into effect the provisions of this Act.

(3) In particular and without prejudice to the generality of the foregoing power, rules made under sub-section (2); may—

(a) require the maintenance of such records, registers, returns and notices as are necessary for the enforcement of the Act, prescribe the form thereof and the particulars to be entered in such registers, or records :

(b) require the display in conspicuous place on premises where employment is carried on of notices specifying rates of wages payable to persons employed on such premises ;

(c) provided for the regular inspection of the weights, measures and weighing machines used by employers in checking or ascertaining the wages of persons employed by them ;

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(d) prescribe the manner of giving notice of the days on which wages will be paid ;

(e) prescribe the authority competent to approve under sub-section (1) of Section 8 acts and omission in respect of which fines may be imposed ;

(f) prescribe the procedure for the imposition of fines under Section 8 and for the making of the deductions referred to in Section 10 ;

(g) prescribe the conditions subject to which deductions may be made under the proviso to sub-section (2) of Section 9 ;

(h) prescribe the authority competent to approve the purposes on which the proceeds of fines shall be expended ;

(i) prescribe the extent to which advances may be made and the instalments by which they may be recovered with reference to clause (b) of Section 12 ;

(i-a) prescribe the extent to which loans may be granted and the rate of interest payable thereon with reference to Section 12-A ;

(i-b) prescribe the powers of Inspectors for the purposes of this Act ;

(j) regulate the scales of costs which may be allowed in proceedings under this Act ;

(k) prescribe the amount of court fees payable in respect of any proceedings under this Act ;

(l) prescribe the abstracts to be contained in the notices required by Section 25 [* * *] ;

(l-a) prescribe the form and manner in which nominations may be made for the purposes of sub-section (1) of Section 25-A, the cancellation or variation of any such nomination, or the making of any fresh nomination in the event of the nominee pre-deceasing the person making nomination ; and other matters connected with such nominations ;

(l-b) specify the authority with whom amounts required to be deposited under clause (b) of sub-section (1) of Section 25-A shall be deposited, and the manner in which such authority shall deal with the amounts deposited with it under that clause ;

(m) provide for any other matter which is to be or may be prescribed.

(4) In making any rule under this section the State Government may provide that a contravention of the rule shall be punishable with fine which may extend to two hundred rupees.

(5) All rules made under this section shall be subject to the condition of previous publication, and the date to be specified under clause (3) of Section 23 of the General Clauses Act, 1897 (10 of 1897), shall not be less than three months from the date on which the draft of the proposed rules was published.

(6) Every rule made by the Central Government under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in [two or more successive sessions] and if, before the expiry of the session [immediately following the session or the successive sessions aforesaid] both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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THE FACTORIES ACT, 1948

CHAPTER I
PRELIMINARY

Introduction.—There has been rise of large scale factory/industry in India in the latter half of the nineteenth century. Major Moore, Inspector-in-Chief of the Bombay Cotton Department, in his report in 1872-73 first of all raised the question for the provision of legislation to regulate working conditions in factories. The first Factories Act was enacted in 1881. Since then the Act has been amended on many occasions. The Factories Act 1934 as passed replacing all previous legislations in regard to factories. This Act was drafted in the light of the recommendations of the Royal Commission on Labour. This Act has also been suitably amended from time to time. The experience of working of the Factories Act, 1934, had revealed a number of defects and weaknesses which hampered effective administration of the Act, and the need for wholesale revision of the Act to extend its protective provisions to the large number of smaller industrial establishments was felt. Therefore, the Factories Act, 1948 consolidating and amending the law relating to labour in factories, was passed by the Constituent Assembly on August 28, 1948. The Act received the assent of Governor-General of India on 23rd September, 1948, and came into force on April 1, 1949..

Changes introduced by the Factories Act, 1948.—The following changes were made by the Factories Act, 1948 :—

(1) The definition of the term "factory" was widened to cover all industrial establishments employing ten or more workers where power was used and 20 or more workers in all other cases.

(2) The distinction between seasonal and non-seasonal factories was abolished.

(3) Under the Act of 1934 the State Governments had power to extend the application of the Act to establishments where power was used and where more than 10 workers were employed. Under the Act of 1948, the State Government may extend the provisions of this Act to any establishment irrespective of the number of the workers employed therein and irrespective of the fact that manufacturing work is carried on by power or otherwise. The only exception is an establishment where the work is done solely by the members of a family.

(4) Chapter III of the Act of 1934 was split into three parts, dealing with health, safety and welfare of workers. The Act specifies very clearly the minimum requirements under three heads stated above.

(5) The basic provisions of the old Act relating to health, safety and welfare are extended to all work places irrespective of the number of workers employed, except premises where processes are carried on by the occupier with the sole aid of his family.

(6) The minimum age for the admission of children to employment has been raised from 12 to 14 years and the minimum permissible daily hours of work of children were reduced from five to four and a half hours.

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(7) Provisions are made for the licensing and registration of factories and the prior scrutiny by the Factories Inspectorate of the plans and specifications of factory buildings.

(8) Employment of children and women between 7 P.M. and 6 A.M. is prohibited. For overtime work the workers are entitled to twice their normal rate of wages.

(9) The State Governments are empowered to make rules requiring the association of the workers in the management of arrangements for the welfare of the workers.

(10) The State Government is obliged to see that all the factories are registered and take a licence for working, which should be periodically renewed. Prior approval of the State Government has been made necessary for every new installation of a factory or for the extension of an existing factory. Besides mines, the new Act also excludes railway running sheds from the definition of factories.

The Factories (Amendment) Act, 1954.—Ratification by India of International Labour Convention relating to prohibtion of employment of young persons during night in factories necessitated the amendment of the Factories Act, 1948, accordingly. A new Chapter dealing with "Annual Leave with Wages" was substituted for Chapter VIII of the Act. A prohibition against employment of women and young persons during night has been enacted by this Act. No women or young person can be employed for cleaning, lubricating or adjusting any prime mover or transmission machinery while it is in motion, if such work is likely to expose them to risk of injury.

Section 1. Scope of the Act.—The Factories Act, 1948, extends to the whole of India, except the State of Jammu and Kashmir. It is a social enactment to achieve social reform and must be construed liberally to achieve its legislative purpose without doing violence to language.[1]

Section 2. Interpretation.—Section 2 of the Factories Act, 1948, defines the following terms and expressions as used in the Act. It says, unless there is anything repugnant in the subject or context—

(a) **"Adult"** means a person who has completed eighteenth year of age.

(b) **"Adolescent"** means a person who has completed his fifteenth year of age but not completed his eighteenth year.

(bb) **"Calendar year"** means the period of twelve months beginning with the first day of January in any year.

(c) **"Child"** means a person who has not completed his fifteenth year of age.

(ca) **"Competent persons"** in relation to any provision of this Act means a person or an institution recognised as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to—

(i) the qualifications and experience of the person and facilities available at his disposal ; or

(ii) the qualification and experience of the persons employed in such institution and facilities available therein,

with regard to the conduct of such tests, examinations and inspections, and more than one person or institution can be recognised as competent person in relation to a factory.

(cb) **"Hazardous process"** means any process or activity in relation to an industry specified in the First Schedule where, unless special care is taken,

[1] *Works Manager, Central Railway Workshop, Jhansi v. Vishwanath*, AIR 1970 SC 488.

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raw materials used therein or the intermediate or finished products, by-products, wastes or effluent thereof would—

(i) cause material impairment to the health of the persons engaged in or connected therewith, or

(ii) result in the pollution of the general environment :

Provided that the State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation of any industry specified in the said Schedule.

(d) **"Young person"** means a person who is either a child or an adolescent.

(e) **"Day"** means a period of twenty-four hours beginning at midnight.

(f) **"Week"** means a period of seven days beginning at midnight on Saturday night or such other night as may be approved in writing for a particular area by the Chief Inspector of Factories.

(g) **"Power"** means electrical energy, or any other form of energy which is mechanically transmitted, and is not generated by human or animal agency.

(h) **"Prime mover"** means any engine, motor or other appliance which generates or otherwise provides power.

(i) **"Transmission machinery"** means any shaft, drum, pulley, system of pulleys, coupling clutch, driving belt or other appliance or device by which the motion of a prime mover is transmitted to or received by any machinery or appliance.

(j) **"Machinery"** includes prime mover, transmission machinery and all other appliances whereby power is generated, transformed, transmitted or applied.

(k) **"Manufacturing process"** means any process for—

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to use, sale, transport, delivery or disposal ; or

(ii) pumping oil, water, sewage or any other substance ; or

(iii) generating, transforming power, or transmitting power ; or

(iv) composing types for printing, printing by letter press, lithography, photogravure or other similar process or book-binding ; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels ; or

(vi) preserving or storing any article in cold storage.

It was held in *State of Bombay* v. *Ali Saheb Kashim Tamboli*,[1] that bidi making is a manufacturing process. The process of transforming and transmitting electrical energy are manufacturing process.[2] Manufacturing process is carried on in sub-sections of Electricity Board within the meaning of Section 2(k)(iii) though there is no transmission of electrical energy.[3] In *Ardeshir* v. *Bombay State*,[4] salt was manufactured from sea water by applying different processes which shows that it is due to the human agency, aided by natural forces, that salt is extracted from sea water. The process carried out in the salt works comes within the definition of 'manufacturing process' in Section 2(k) inasmuch as salt can be said to have been manufactured from sea water by the process of treatment and adaptation of sea water into salt.

1. (1995) 2 LLJ 182.
2. *Nagpur Electric Light and Power Co. Ltd.* v. *The Regional Director, Employees' State Insurance Corporation*, AIR 1967 SC 1364.
3. *Public Prosecutor, High Court of A.P.* v. *B. Bhandari*, AIR 1970 AP 221.
4. AIR 1962 SC 29.

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In the matter of *K.V.V. Sharma*[1] conversion of raw films into a finished product was held to be a manufacturing process. Similarly in *New Taj Mahal Cafe Ltd., Managalore* v. *Inspector of Factories, Mangalore*[2] the preparation of foodstuffs and other eatable in the kitchen of a restaurant and use of a refrigerator for treating or adapting any article with a view to its sale were also held to be manufacturing process.

In *Gateway Auto Services* v. *Regional Director E.S.I.C.,*[3] it was held that in the lubricating services of motor vehicles, power is used to drive compressors which supply compressed air for operating service hoists and pressure and oil spray guns. The fact that pump is installed on the petrol tank underground and with the aid of power, the petrol is lifted and poured into the tanks of vehicles, makes the activity manufacturing process within the meaning of Section 2(k) of the Factories Act.

In *Gujarat Electricity Board* v. *State of Gujarat and another,*[4] the Court had to determine whether the conversion of high voltage into low voltage and distribution of electricity amounts to "manufacturing process". It was held that these activities are not covered by the expression "manufacturing process" as envisaged under Section 2(k) of the Factories Act because these activities do not involve generation of power. Therefore, any sub-station engaged in conversion or distribution of electricity is not a factory.

(i) **"worker"** means a person employed directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with the manufacturing process or the subject of the manufacturing process. But 'worker' does not include any member of the armed forces of the Union.

The definition of 'worker' does not exclude employees who are entrusted wholly with electrical duties, if they otherwise fall within the definition of the word "worker".[5]

A person, in order to be a worker within the meaning of this section, need not necessarily receive wages.[6] Therefore, a person working on any manufacturing process in a factory is a worker even though he does not receive wages. The expression "whether for wages or not" used in this sub-section means whether the person receives wages as remuneration for his service or such person is an apprentice learning work or is an honorary worker. Whether a person is always a worker or not is a question of fact in each case. It was held in In re *K.M.P. Kodar Moideen* v. *State,*[7] that a watchman will be a worker only if the duties actually discharged by him sufficiently show that he is employed in any kind of work whatsoever incidental to or connected with, the subject of the manufacturing process. In a case, where 'A' was the owner of a ginning factory, certain men were engaged in putting the ginned cotton into bojhas. These persons were engaged not by 'A' but by merchants who owned cotton, and their names were not shown in the attendance register of the factory ownered by 'A'. As the filling of the cotton into bojhas within the compound of the factory was a work "incidental to or connected with" the manufacturing process, these persons where held to be workers under the Factories Act, and the fact that labourers were employed by the merchants who owned the cotton and not by the factory owner does not make any difference.[8] The

1. (1950) 1 LLJ 29.
2. (1956) 1 LLJ 273.
3. (1980) 2 LLJ 255 (Bombay).
4. (1984) 2 LLJ 370 (Guj).
5. *Works Manager, Central Railway Workshop, Jhansi* v. *Vishwanathan*, AIR 1970 SC 488.
6. *State of Bombay* v. *Alisaheb Kashim Tamboli*, AIR 1955 Bom 209.
7. AIR 1953 Mad 406.
8. *Local Government* v. *Nauserwanji*, AIR 1933 Nag 283.

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persons employed for only selling the manufactured articles are not covered by the expression "employed" in the factory even though they happen to occupy a room at the factory for the sake of convenience.[1]

In *Rohtas Industries* v. *Ramlakhan Singh*,[2] a person was employed in a paper factory. He was engaged in supervision and checking quality and weightment of waste papers and rags which are the basic raw-materials for the manufacture of paper. He used to deal with receipts and maintain records of stocks and pass the bills of the suppliers of the waste paper and rags. He used to work in the precincts of the factory and in case of necessities had to work inside the factory. It was held that he was working in the factory premises or its precincts in connection with the work of the "subject of the manufacturing process", namely, the raw-materials. Thus he was factory worker.

In *Birdhichand* v. *First Civil Judge*,[3] the workmen worked at the Bidi factory and were not at liberty to work at their homes. Further they worked within certain hours which were the factory hours, though they were not bound to work for the entire period and could go away whenever they liked. Their attendance was noted in the factory and they could go away at any time they liked. But if any of them came after midday he was not supplied with tobacco and was thus not allowed to work even though the factory closed at 7 p.m. in accordance with the provisions of the Factories Act. Under the standing orders in the factory a worker who remained absent for eight days (possibly without leave) could be removed. The payment was made on piece rates according to the amount of work done but the management had the right to reject such bidis as did not come upto the proper standard. It was held that "the workers were not independent contractors but were workers within the meaning of Section 2(1) of the Factories Act". In view of the nature of the work in the present case it could hardly be said that there must be supervision all the time when bidis were being prepared and unless there was such supervision there could be no direction as to the manner of work. In the case under consideration the control of the manner in which the work was done was exercised at the end of the day, when bidis were ready, by the method of rejecting those which did not come up to the proper standard. In such a case it was the right to supervise and not so much the mode in which it was exercised which was important.

In *Shankar Balaji* v. *State of Maharashtra*,[4] one Pandurang rolled bidis in appellant's factory. There was no agreement or contract of service between the appellant and Pandurang (hereinafter referred to as P). P was not bound to attend the factory for the work for any fixed hours of work or for any fixed period. He was free to go to the factory at any time he liked and was equally free to leave the factory whenever he liked. He could also be absent on any day he liked. But if he was likely to be absent for more than 10 days he had to inform the appellant, not for the purpose of taking his permission for leave, but for the purpose of assuring him that he had no intention to give up work at the factory. There was no actual supervision of the work which P did in the factory. P was paid at fixed rates on the quantity of bidis turned out. There was no condition that he had to turn out any minimum quantity of bidis in a day. Leaves were supplied to P for being taken home and cut thereto. Tobacco to fill the bidis used to be supplied at the factory. But P was not bound to roll the bidis at the factory. He could do so at his place on taking permission of the appellant for taking tobacco home. The permission was necessary on account of Excise Rules and not on account of any condition of alleged service. At the close of the day the bidis were delivered to the appellant and bidis not upto the standard used to be rejected. P's attendance was not noted though the

1. *Prag Narain* v. *Emp.*, AIR 1928 Lah 78.
2. AIR 1978 SC 849.
3. AIR 1961 SC 644.
4. AIR 1962 SC 57.

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days he worked could be found out from the work register. It was held that P could not be said to be employed by the appellant and so was not a worker. In this case the following observations were made :

(i) The concept of employment involves three ingredients : (1) employer, (2) employee and (3) the contract of employment. The employer is one who employs, *i.e.*, one who engages the services of other persons. The employee is one who works for another for hire. The employment is the contract of service between the employer and the employee whereunder the employee agrees to serve the employer subject to his control and supervision. Employment brings in the contract of service between the employer and the employee.

(ii) The mere fact that the person rolling bidis has to roll them in a particular manner cannot be said to give rise to such a right in the management as can be said to be a right to control the manner of work. Every worker will have to turn out the work in accordance with the specifications. The control of the management which is a necessary element of the relationship of master and servant is not directed towards providing or dictating the nature of the article to be produced or the work to be done but refers to the other incidents having a bearing on the process of work of the person who comes out in the execution of the work. The manner of work is to be distinguished from the type of work to be performed. In the instant case the management simply says that the labour is to produce bidi rolled in a certain form. How the labour carries out the work is his own concern and is not controlled by the management, which is concerned only with getting bidi rolled in a particular style with certain contents.

(iii) It is true that persons engaged to roll bidis on job work basis could be 'workers' but only such persons would be workers who work regularly at the factory and are paid for the work turned out during their regular employment on the basis of work done. Piece rate workers can be workers within the definition of worker in the Act, but they must be regular workers and not workers who come and work according to their sweet will. It is also true that a worker within the definition of that expression in the Act, need not be a whole-time worker. But even then the worker must have under his contract of service, an obligation to work either for a fixed period or between fixed hours. The whole conception of service does not fit in well with a servant who has full liberty to attend to his work according to his pleasure and not according to the orders of his master.

In order to be a workman under this Act a person must be employed exclusively in a manufacturing process or in cleaning the machinery or the premises used for the manufacturing process or in any kind of work incidental to or connected with, the manufacturing process or the subject of the manufacturing process. Thus, if the employees of Hospital laundry are not exclusively employed in the laundry but do all kinds of work in the various departments of the Hospital, such as clinical, medical surgical, sanitary etc. they are not workers under this Act.[1]

(m) **"Factory"** means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried

1. *Dr. P.S.S. Sunder Rao, General Superintendent Christian Medical College and Hospital Vellore v. Inspector of Factories Vellore*, (1984) 2 LLJ 237 (Mad).

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on ; or

(ii) whereon twenty or more workers are working, or were working on any of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on.

Factory does not include a mine subject to the operation of the Mines Act, 1952 or a mobile unit belonging to the armed forces of the Union, a railway running shed or hotel, restaurant or eating place.

Explanation I.—For computing the number of workers for the purposes of this clause all the workers in different groups and relays in a day shall be taken into account.

Explanation II.—For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof.

The phrase "premises including precincts" means "both premises with and premises without precincts". Where premises is a building it would include precincts also, but where premises are lands, they would not have precincts. Thus both buildings and lands are covered by the above expression. It was held in *State of Bombay* v. *Ardeshir Hormosji Bhiwandiwala*,[1] that lands in which the process of manufacturing salt is carried on is a factory.

There was a slate quarry extending over a large open space of about 300 acres. The work was carried on in the open air. Shed was the only building. In the quarry more than 50 persons were employed for splitting the rock into slates and shaping them for sale. It was held that the quarry was not a factory for, if a place in which a manufacturing process is carried on is an open space, it cannot constitute a factory.[2] In *Pragnarain* v. *Crown*,[3] it was held that factory means premises wherein anything is done towards the making or finishing of an article upto the stage when it is ready to be sold or is in a suitable condition to be put in the market.

Precincts means a space enclosed by walls or fences.[4] A place solely used for some purposes other than the manufacturing process carried on in a factory or a workshop does not constitute a factory. In re *K.V.V. Sharma*,[5] persons employed in the production of films were held to be workers within the meaning of Section 2(1) of the Act, as the act is not limited to manual labour only but it also applies to intellectual, aesthetic and artistic labour also. In the *Sharma*'s case the question was whether the work of converting raw film into a finished product by means of the various scientific and physical processes comes within the meaning of the provisions in the Act. Raw film is an article or a substance and by the process of treating or adapting it is rendered fit to be screened in a Cinema Theatre. Therefore, the process of conversion of raw film into a film for exhibition in a cinema is manufacturing process within the meaning of clause (i) of Section 2(k) of the Act.

In re *K. Chockalingam*,[6] A was the owner of a concern for the manufacture of cigars. Twenty persons were employed in that concern. Out of the twenty employees, one was a graduate and supervised the work, the other one was an apprentice, and the rest eighteen were employed not in the time wages system but in the piece work system. It was held that the concern is a factory, and the persons employed in manufacturing of

1. (1956) 1 LLJ 26.
2. *Kent.* v. *Astely*. (1819) LR 5 QB 19.
3. AIR 1928 Lah 78.
4. In re *K.V.V. Sharma*. AIR 1953 Mad 269.
5. *Ibid.*
6. AIR 1954 Mad 324.

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cigars on piece-work system are workers within the meaning of clause (1) of Section 2 and the fact that they were not paid time-wages does not takes them out of definition of "worker".

In *Hathras Municipality* v. *Union of India*[1] the Municipal Board, Hathras was running a waterworks for the supply of water to the town. It was held that, "the pumping of water is a manufacturing process according to the definition given in this Act, even though it may not be so in the common parlance. Waterworks is, therefore, clearly covered by the definition of "factory" and the Act is applicable to it. It is not disputed that ten or more persons are working in it and water is pumped by use of power.

In order that any premises may be held as a factory the following conditions must be fulfilled :—

(a) a manufacturing process must be carried on in any part of the premises of the establishment ; and

(b) where manufacturing process is carried on with the aid of power ten or more workers must be working and where manufacturing process is carried on without the aid of power twenty or more workers must be working in that establishment. But the mere fact that the power is used in the premises is not sufficient, but power must be used in the aid of manufacturing process.[2]

Factory is a premises where a manufacturing process is carried on. No manufacturing process was held to take place either in the sub-stations or in the Zonal Stations of the Delhi Electric Supply Undertaking because the workmen employed therein have no part in any manufacturing process.[3] A gas main, belonging to a gas company and situated about 400 yards out of the factory was held to be belonging to the precincts of the factory.[4] In a case a building was constructed by a contractor who was employed by the company, it was the duty of the contractor to maintain the mechanical equipment used by the works department. Some machinery for use was moved in the building but there was no electric power for the machinery to be driven. The work of installation of the plant and fixation of the equipments on the wall was started by the Works Department but both the building and equipment were incomplete. The company brought a lorry and the driver started it cleaning in preparation for painting the lorry. The lorry was placed by the driver alongside in open pit. It was held that the kind of work intended to be done in the building had begun, even though the building and equipments were still incomplete in certain respects. The nature of work intended involved manual labour and was the process incidental to altering, repairing and cleaning of the lorry, therefore, the building was a factory.[5]

It was held in *Employees' State Insurance Corpn.* v. *Jalandhar Gymkhana Club*,[6] that the preparation of food and drinks in the kitchen attached to the club and the preservation and storing of articles in the cold storage would be a manufacturing process under Section 2(k) of the Factories Act and therefore it follows that the premises of the club is a factory under Section 2(m) of the Factories Act, 1948.

In *Ardeshir* v. *Bombay State*[7] it was held that the word 'premises' is a generic term meaning open land or land with buildings or buildings alone. The expression "premises including precincts" does not necessarily mean that the premises must always have

1. AIR 1975 Alld 364.
2. *New Taj Mahal Cafe Ltd. Mangalore* v. *Inspector of Factories, Mangalore*, (1950) 1 LLJ 273.
3. *Workmen, Delhi Elect. Supply Undertaking* v. *Management*, AIR 1973 SC 365.
4. Dolores Gas and Coal Co. Ltd. Case, (1905) 2 KB 878.
5. *Barrington* v. *Kent River Catchment, Board*, (1974) 2 All ER 282.
6. (1993) 1 LLJ 477 (P & H) ; *See* also *Cricket Club of India Ltd.* v. *E.S.I.C. & Another*, (1993) 1 LLJ 642 (Bom).
7. AIR 1962 SC 29.

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precincts. Even buildings need not have any precincts. The word 'including' is not a term restricting the meaning to the word 'premises' but is a term which enlarges its scope. The use of the word 'including', therefore, does not indicate that the word 'premises' must be restricted to main building and be not taken to cover open land as well. Though some of the provisions of the Act cannot be applicable to salt works where the process of converting seawater into salt is carried on in the open, there is nothing in the Act which makes it uniformly compulsory for every occupier of a factory to comply with every requirement of the Act. An occupier is to comply with such provisions of the Act which apply to the factory he is working. Hence salt works would come within the meaning of the word 'premises' used in the definition in Section 2(m).

In *Graner and Weil (India) Ltd.* v. *Collector of Central Excise, Baroda*,[1] the chronic acid section was situated in the same plot of land in which the petitioners were manufacturing sodium and potassium dichromate in another building. In acid section only four workers were employed. Both had common water and power connections and common payment was also made for those facilities. There were common payments to workers. It was held that the word "any premises including the procincts thereof" under Section 2(m) of the Factories Act is wide enough to include all buildings with the surroundings which form part of one unit. If, therefore, in such an area ten or more workers are working and in any part thereof manufacturing process is carried on with the aid of power, it would be a factory within the meaning of Section 2(m) of the Act. Therefore even chronic acid section was also a factory.

In *V.P. Gopala Rao* v. *Public Prosecutor, Andhra Pradesh*[2] sun-cured tobacco leaves was subjected to processes of moistening, stripping and packing in a company's premises with a view to their use and transport to company's main factory for manufacturing cigarettes. More than twenty persons under supervision of management were working in the premises. It was held that the manufacturing process was carried on in the premises and the persons employed were 'workers' and premises a 'factory' within the meaning of Section 2(m) of the Act.

In *Dr.P.S.S. Sundar Rao, G.S.* v. *Inspector of Factories Vellore*,[3] the question was whether a laundry attached to the Christian Medical College & Hospital, Vellore is factory within the meaning of this Act. The Madras High Court held that the laundry run by the Hospital cannot be separated from the main institution. In order to ensure high degree of hygienic standard the Hospital is having its own laundry for washing the linen used in the Hospital. Therefore, laundry is only subsidiary, minor or incidental establishment of the Hospital which is not a factory. One department of the Hospital established for the efficient functioning of the Hospital cannot therefore, be disjoined from the main institution and termed to be a factory. The paramount or the primary character of the main institution alone has to be taken into consideration and when the main institution is not a factory, a department thereof cannot become so, even though a manufacturing process is carried on there.

(n) "Occupier".—Occupier of a factory means the person who has ultimate control over the affairs of the factory.

"Provided that—

(i) in the case of a firm or other association of indiviuals, any one of the individual partners or members thereof shall be deemed to be the occupier ;

(ii) in the case of a company, any one of the directors shall be deemed to be the occupier ;

1. (1995) 2 Lab LJ 648 (SC).
2. AIR 1970 SC 66.
3. (1984) 2 LLJ 237 (Mad).

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(iii) in the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier :

"Provided further that in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire,—

(1) the owner of the dock shall be deemed to be the occupier for the purposes of any matter provided by or under—

(a) Section 6, Section 7, Section 7-A, Section 7-B, Section 11 or Section 12 ;

(b) Section 17, in so far as it relates to the providing and maintenance of sufficient and suitable lighting in or around the dock ;

(c) Section 18, Section 19, Section 42, Section 46, Section 47 or Section 49, in relation to the workers employed on such repair or maintenance ;

(2) the owner of the ship or his agent or master or other officer-in-charge of the ship or any person who contracts with such owner, agent or master or other officer-in-charge to carry out the repair or maintenance work shall be deemed to be the occupier for the purposes of any matter provided for by or under Section 14, Section 15, Section 16 or Section 17 (save as otherwise provided in this proviso) or Chapter IV (except Section 27) or Section 43 Section 44 or Section 45, Chapter VI, Chapter VII, Chapter VIII or Chapter IX or Section 108, Section 109 or Section 110, in relation to—

(a) the workers employed directly by him, or by or through any agency ; and

(b) the machinery, plans or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in-charge or person.

The expression 'occupier' as defined in Section 2(n) Factories Act is not to be equated with 'owner'. No doubt the ultimate control over a factory must necessarily be with an owner unless the owner has completely transferred that control to another person. Whether that was done in a particular case is a question of fact. Therefore, the manager of a factory who claims to be an occupier of the factory must lay before the Chief Inspector of the Factories the necessary material for showing that the company had in some manner transferred the entire control over the factory to him. In the absence of such material an application for renewal of licence signed by the manager is not in proper form and cannot be acted upon.[1] Where premises are given over to partnership firm in return for periodic payment and the owner of the premises has no control over them, he cannot be said to be an 'occupier'.[2]

It was held in *Kirloskar Pneumatic Co. Ltd.* v. *V.A. More & others*,[3] that an occupier need not necessarily be a Director of the Company. Any person who had ultimate control over the affairs of factory can be nominated as occupier.

It was held in *ION Exchange India Ltd.* v. *Deputy Chief Inspector of Factories, Salem*,[4] that owner can nominate any person to be in ultimate control over the affairs of a factory. If no one else has been nominated to be in ultimate control over the affairs of the Company, Director of a company or any partner of partnership are deemed to be the occupier.

In *Wimco Ltd. and others* v. *Union of India and others*,[5] the question was whether any person other than a Director of a Company can be an "occupier" under Section 2(n) of the Factories Act, after the amendment in 1987. It was held that under Section 2(n) a person who has the ultimate control of the factory can be nominated as occupier. It is the ultimate control of the factory which is the touch stone and not the ultimate control of the company. A director may not be in the ultimate control of the factory. A director may live at a distance and a manager may be in the ultimate control of the factory and may be as such nominated as occupier. The proviso to Section 2(n) says that a person who has ultimate control over the affairs of the factory may be deemed an occupier. It means that a director will be deemed to be an occupier even though he may not have the ultimate control over the factory.

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1. *Donald Mackenzie* v. *Chief Inspector of Factories*, AIR 1962 SC 1351.
2. *State of Maharashtra* v. *Jamnabai Purshottam*, AIR 1968 SC 53.
3. (1993) 1 LLJ 805 (Bom).
4. (1996) 1 LLJ 283 (Mad).
5. (1995) 1 Lab LJ 552 (Gau).

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In *Indian Oil Corporation Ltd.* v. *Chief Inspector of Factories*,[1] the question for consideration was : who is to be deemed 'occupier' of a factory of a Government Company incorporated under the Indian Companies Act ? It was held that the Indian Oil Corporation which is Government Company and which owns factories for establishing new storage unit, it is open to Central Government to nominate any person other than Director as the occupier of factory. For the purpose of Section 2(n) what is to be seen is who has the ultimate control over the affairs of the factory. It is time that Indian Oil Corporation is a legal entity, has a separate and independent existence of its own and right to manage the affairs of Corporation including the rights to setup and run the factories vests in Board of Directors, yet relevant provisions regarding establishment of the corporation and its working leave no doubt that the ultimate control over all the affairs of the corporation, including opening and running of factories, is with the Central Government. Acting through the corporation is only a method employed by the Central Government for running its petroleum industry. In the context of Section 2(n) it will have to be held that all the activities of the Corporation are really carried on by the Central Government with a corporate mask. As the factories run by the Indian Oil Corporation are effectively and really owned and controlled by the Central Government they fall within the purview of clause (iii) and not clause (ii) of the first proviso to Section 2(n). The person appointed by the Central Government to manage the affairs of the factories shall be deemed to be the occupiers of those factories for the purposes of Section 2(n) of the Factories Act.

West India Steel Company Ltd. v. *Azeez*[2] a trade union leader obstructed work in the factory for five hours protesting against deputation of workman to work in another section. It was held that a worker inside the factory is bound to obey the reasonable instructions given by his superiors and carry out the duties assigned to him. The mere fact that such worker, is a trade union leader, does not confer on him any impunity in that regard. A trade union leader has no right in law to share managerial powers and he cannot dictate about any worker, individually or to the workmen generally about the manner in which they have to do their work or discharge their duties. A trade union can espouse, the cause of the workers and can resort to lawful agitators for indicating their rights but officials of trade union are not entitled to order a workman to stop his work or otherwise obstruct the work of the establishment. Where officials of a trade union obstruct the work the management is justified in proceeding against such worker and deal with him effectively.

(p) **"Prescribed"** means prescribed by rules made by the State Government under this Act.

(r) **"Group or Relay and shift".**—Where work of the same kind is carried out by two or more sets of workers during different periods of the day each of such sets is called a "group or relay" and each of such periods is called a "shift".

Section 3. Reference to time of day.—Section 3 of the Act provides that in this Act references to time of day are references to Indian Standard Time, being five and a half hours ahead of Greenwich Mean Time. But for any area in which Indian Standard Time is not observed, the State Government may make rules :

(a) specifying the area ;

(b) defining the local Mean Time ordinarily observed therein ; and

(c) permitting such time to be observed in all or any of the factories situated in the area.

Section 4. Power to declare different departments to be separate factories or two or more factories to be a single factory.—The State Government may on its own or on an application made in this behalf by an occupier, direct by an order in writing and subject to such condition as it may deem fit that for all or any of the purposes of this Act, different departments or branches of a factory of the occupier specified in the application shall be treated as separate factories or that two or more factories of the occupier specified in the application shall be treated as a single factory :

Provided that no order under this section shall be made by the State Government on its own motion unless an opportunity of being heard is given to the occupier.

Section 5. Power to exempt during public emergency.—In any case of public emergency the State Government may by notification in the official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act except Section 67 for such period and subject to such conditions as it may think fit. But

1. AIR 1998 SC 2456.
2. (1990) 2 Lab LJ 334 (All).

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no such notification should be made for a period exceeding three months at a time.

Explanation.—For the purposes of this section "public emergency" means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.

Section 6. Approval, licensing and registration of factories.—Section 6 of the Act confers rule-making power upon the Government. According to this section the State Government may make rules—

(a) requiring for the purposes of this Act, the submission of plans of any class or description of factories to the Chief Inspector or the State Government ;

(aa) requiring the previous permission in writing of the State Government or the Chief Inspector to be obtained for the site on which the factory is to be situated and for the construction or extension of any factory or class or description of factories ;

(b) requiring for the purpose of considering application for such permission, the submission of plans and specification ;

(c) prescribing the nature of such plans and specifications and by whom they shall be certified ;

(d) requiring the registration and licensing of factories or any class or description of factories, and prescribing the fees payable for such registration and licensing and for the renewal of licences ;

(e) requiring that no licence shall be granted or renewed unless the notice specified in Section 7 has been given.

Sub-section (2) of Section 6 lays down that if on an application for permission referred to in clause (aa) of sub-section (1) accompanied by the plans and specifications required by the rule made under clause (b) of that sub-section, sent to the State Government or Chief Inspector by registered post, no order is communicated to the applicant within three months from the date on which it is so sent, the permissions applied for in the said application shall be deemed to have been granted.

Sub-section (3) of Section 6 provides that, where a State Government or a Chief Inspector refuses to grant permission to the site, construction or extension of a factory or to the registration and licensing of a factory, the applicant may within thirty days of the date of such refusal appeal to the Central Government if the decision appealed from was of the State Government, and to the State Government in any other case.

Explanation.—A factory shall not be deemed to be extended within the meaning of this section by reason only of the replacement of any plant or machinery, or within such limits as may be prescribed, or the addition of any plant or machinery, if such replacement or addition does not reduce the minimum clear space required for safe working around the plant or machinery or adversely affect the environmental conditions from the evolution or emission of steam, heat or dust or fumes injurious to health.

This section lays down a statutory duty on the licensing authority to consider the application for registration and issue of licence. After satisfaction of the requirements of the Act and the rules made thereunder, the licensing authority is bound to issue the licence applied for. There is right of appeal to Government in case the Chief Inspector declines to grant registration and refuses to issue the licence. Licensing authority cannot refuse registration and issue of licence on the basis of direction of the appellate authority. Such directions are invalid.[1]

Section 7. Notice by occupier.—Section 7(1) lays down that the occupier shall at least fifteen days before he begins to occupy or use any premises as a factory, send to the Chief Inspector a written notice containing—

1. *Shihabudeen Kunju* v. *State of Kerala and others*, (1985) 2 LLJ 106 (Ker).

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(a) the name and situation of the factory ;

(b) the name and address of the occupier ;

(bb) the name and address of the owner of the premises or building (including the precincts thereof) referred to in Section 93 ;

(c) the address to which communications relating to the factory may be sent ;

(d) the nature of the manufacturing process—

(i) carried on in the factory during the last twelve months in the case of factories in existence on the date of the commencement of this Act, and

(ii) to be carried on in the factory during the next twelve months in the case of all factories ;

(e) the total rated horse power installed or to be installed in the factory, which shall not include the rated horse power of any separate standby plant ;

(f) the name of the manager of the factory for the purposes of this Act ;

(g) the number of workers likely to be employed in the factory ;

(h) the average number of workers per day employed during the last twelve months in the case of a factory in existence on the date of the commencement of this Act ;

(i) such other particulars as may be prescribed.

Sub-section (2) of Section 7 lays down that in respect of all establishments which come within the scope of the Act for the first time, the occupier shall send a written notice to the Chief Inspector containing the particulars specified in sub-section (1) within thirty days from the date of the commencement of this Act.

Sub-section (3) lays down that before a factory, engaged in a manufacturing process which is ordinarily carried on for less than one hundred and eighty working days in the year, resumes working, the occupier shall send a written notice to the Chief Inspector containing the particulars specified in sub-section (1) at least thirty days before the date of the commencement of work.

Sub-section (4) provides that whenever a new manager is appointed, the occupier shall send to the Inspector a written notice and to the Chief Inspector a copy thereof within seven days from the date on which such person takes over charge.

Sub-section (5) lays down that during any period for which no person has been designated as a manager of the factory or during which the person designated does not manage the factory, any person found acting as a manager, or if no such person is found, the occupier himself shall be deemed to be the manager of the factory for the purposes of this Act.

Section 7-A. General duties of the occupier.—(1) Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.

(2) Without prejudice to the generality of the provisions of sub-section (1), the matters to which such duty extends, shall include—

(a) the provision and maintenance of plant and systems of work in the factory that are safe and without risks to health ;

(b) the arrangements in the factory for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances ;

(c) the provision of such information, instructions, training and supervision as are necessary to ensure the health and safety of all workers at work ;

(d) the maintenance of all places of work in the factory in a condition that is

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safe and without risks to health and the provision and maintenance of such means of access, to and egress from, such places as are safe and without such risks ;

(e) the provision, maintenance or monitoring of such working environment in the factory for the workers that is safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work.

(3) Except in such cases as may be prescribed, every occupier shall prepare, and, as often as may be appropriate, revise, a written statement of his general policy with respect to the health and safety of the workers at work and the organisation and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision thereof to the notice of all the workers in such manner as may be prescribed.

Section 7-B. General duties of manufacturers, etc., as regards articles and substances for use in factories.—(1) Every person who designs, manufactures, imports or supplies any article for use in any factory shall—

(a) ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risks to the health of the workers when properly used ;

(b) carry out or arrange for the carrying out of such test and examination as may be considered necessary for the effective implementation of the provisions of clause (a) ;

(c) take such steps as may be necessary to ensure that adequate information will be available—

(i) in connection with the use of the article in any factory ;

(ii) about the use for which it is designed and tested ; and

(iii) about any conditions necessary to ensure that the article, when put to such use, will be safe, and without risk to the health of the workers :

Provided that where an article is designed or manufactured outside India, it shall be obligatory on the part of the importer to see—

(a) that the article conforms to the same standards if such article is manufactured in India ; or

(b) if the standards adopted in the country outside for the manufacture of such article is above the standards adopted in India, that the article conforms to such standards.

(2) Every person, who undertakes to design or manufacture any article for use in any factory, may carry out or arrange for the carrying out of necessary research with a view to the discovery and so far as is reasonably practicable, the elimination or minimisation of any risks to the health or safety of the workers to which the design or article may give rise.

(3) Nothing contained in sub-sections (1) and (2) shall be construed to require a person to repeat the testing, examination or research which has been carried out otherwise than by him or at his instance in so far as it is reasonable for him to rely on the results thereof for the purposes of the said sub-section.

(4) Any duty imposed on any person by sub-sections (1) and (2) shall extend only to things done in the course of business carried on by him and to matters within his control.

(5) Where a person designs, manufactures, imports or supplies an article on the basis of a written undertaking by the user of such article to take the steps specified in such undertaking to ensure, so far as is reasonably practicable, that the article will be safe and without risks to the health of the workers when properly used, the undertaking

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shall have the effect of relieving the person designing, manufacturing, importing or supplying the article from the duty imposed by clause (a) of sub-section (1) to such extent as is reasonable having regard to the terms of the undertaking.

(6) For the purposes of this section, an article is not to be regarded as properly used if it is used without regard to any information or advice relating to its use which has been made available by the person who has designed, manufactured, imported or supplied the article.

Explanation.—For the purposes of this section, "article" shall include plant and machinery.

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CHAPTER II
THE INSPECTING STAFF

Section 8. Inspectors.—Section 8(1) lays down that the State Government may, by notification in the official Gazette, appoint Inspector for the purposes of this Act. Only such persons who possess the prescribed qualifications may be appointed Inspectors. The State Government may assign to the Inspector such local limits as it thinks fit.

Sub-section (2) of Section 8 provides that the State Government may by notification in the official Gazette appoint any person as Chief Inspector. The Chief Inspector in addition to his powers as a Chief Inspector under this Act, shall exercise the power of an Inspector throughout the State.

Under sub-section (2-A) the State Government may, by notification in the Official Gazette, appoint as many Additional Chief Inspectors, Joint Chief Inspectors and Deputy Chief Inspectors and as many other officers as it thinks fit to assist the Chief Inspector and to exercise such of the powers of the Chief Inspector as may be specified in such notification.

Under sub-section (2-B) every Additional Chief Inspector, Joint Chief Inspectors, Deputy Chief Inspector and every other officer appointed under sub-section (2-A) shall, in addition to the powers of a Chief Inspector specified in the notification by which he is appointed, exercise the powers of an Inspector throughout the State.

Section 8(3) lays down that any person, having any direct interest in a factory or any process or business carried on therein or in any patent or machinery connected therewith, cannot be appointed as Inspector, Chief Inspector or public officer, etc. under sub-section (1), sub-section (2), or sub-section (2-A) or sub-section (5), or, having been so appointed, shall not continue to hold office after occurrence of the aforesaid disqualification.

Section 8(4) says that every District Magistrate shall be an Inspector for his district.

Sub-section (5) provides that the State Government may also by Gazette notification appoint public officers for all or any of the purposes of this Act. These public officers shall be additional Inspectors within such local limits as may be assigned to them.

Section 8(6) lays down that in any area where there are more than one Inspector, the State Government may, by Official Gazette notification declare the powers which such Inspectors shall respectively exercise and the Inspectors to whom the prescribed notices are to be sent.

Section 8(7) declares that every Chief Inspector, Additional Chief Inspector, Joint Chief Inspector, Deputy Chief Inspector and every other officer appointed under this section shall be deemed to be a public servant within the meaning of the Indian Penal Code and shall be officially subordinate to such authority as the State Government may specify in this behalf. When District Magistrate acts as an Inspector under sub-section (4) his act is an executive act and not a judicial act.[1]

Section 9. Powers of Inspectors.—According to Section 9 of the Act an Inspector has the following powers within the local limits for which he is appointed and

1. *Gajadhar Lakshmiram* v. *Emperor*, AIR 1948 Nag 277.

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his powers are subject to any rules made in this behalf under the Act :—

(a) he may enter any place which is used or which he has reason to believe is used, as a factory. He may be accompanied by such assistants, who are in the service of the Government or any local or other public authority or with expert, as he thinks fit ;

(b) make examination of the premises, plant, machinery, article or substance,

(c) inquire into any accident or dangerous occurrence, whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry ;

(d) require the production of any prescribed register or any other document relating to the factory ;

(e) seize or take copies of, any register, record or other document or any portion thereof, as he may consider necessary in respect of any offence under this Act, which he has reason to believe, has been committed ;

(f) direct the occupier that any premises or any part thereof, or anything lying therein, shall be left undisturbed (whether generally or in particular respects) for so long as is necessary for the purpose of any examination under clause (b) ;

(g) take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination under clause (b), taking with him any necessary instrument or equipment ;

(h) in case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is in the circumstances necessary, for carrying out the purposes of this Act), and take possession of any such article or substance or a part thereof and detain it for so long as is necessary for such examination ;

(i) exercise such other powers as may be prescribed.

In *D.C. & G. Mills Co.* v. *Chief Commr. Delhi*,[1] it was held that "the Inspectors appointed under the Factory Rules do not simply carry out the duties laid on them under the Act. In the course of discharge of their duties and obligations the Inspectors are expected to give proper advice and guidance so that there may be due compliance with the provisions of the Act. It can well be said that on certain occasions factory owners are bound to receive a good deal of benefit by being saved from the consequences of the working of dangerous machines or employment of such processes as involve danger to human life by being warned at the proper time as to the defective nature of the machinery or of the taking of precautions which are enjoined under the Act. It involves a good deal of technical advice".

Section 10. Certifying surgeons.—Section 10 lays down that the State Government may appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act. The certifying surgeons shall be appointed within such local limits or for such factory or class or description of factories as may be assigned to them by the State Government. Sub-section (2) lays down that a certifying surgeon may, with the approval of the State Government, authorise any qualified medical practitioner to exercise any of his powers under this Act for such period as the certifying surgeon may specify and subject to such conditions as the State Government may think fit to impose. It is further provided that any references in this Act, to a certifying surgeon shall be deemed to include reference to any qualified medical practitioner, when so authorised.

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1. AIR 1971 SC 344.

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Section 10(3) lays down that any person who is the occupier of a factory or is directly or indirectly interested therein or in any process or business carried on therein or in any plant or machinery connected therewith or is otherwise in the employ of the factory, shall not be appointed to be or authorised to exercise the powers of a certifying surgeon. Any such person shall not continue to exercise such powers after occurrence of any such disqualifications as stated above. Provided that the State Government may, by order in writing and subject to such conditions as may be specified in the order, exempt any person or class of persons from the provisions of this sub-section in respect of any factory or class or description of factories.

Section 10(4) enacts that the certifying surgeon shall carry out such duties as may be prescribed in connection with—

(a) the examination and certification of young persons under this Act ;

(b) the examination of persons engaged in factories in such dangerous occupation of processes as may be prescribed ;

(c) the exercising of such medical supervision as may be prescribed for any factory or class or description of factories where—

(i) cases of illness have occurred which it is reasonable to believe are due to the nature of the manufacturing process carried on or other conditions of work prevailing therein ;

(ii) by reason of any change in the manufacutring process carried on or in the substances used therein or by reason of the adoption of any new manufacturing process, or of any new substance for use in a manufacturing process there is likelihood of injury to the health of workers employed in that manufacturing process ;

(iii) young persons are, or are about to be, employed in any work which is likely to cause injury to their health.

Explanation.—In this section "qualified medical practitioner" means a person holding a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act, 1916, or in the Schedule to the Indian Medical Council Act, 1933.

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CHAPTER III
HEALTH

Section 11. Cleanliness.—Section 11 lays down that every factory shall be kept clean and free from effluvia arising from any drain, privy or other nuisance. The following precautions shall be taken in particular :

(a) accumulation of dirt and refuse shall be removed daily by sweeping or by any other effective method from the floors and benches of work rooms and from staircases and passages and disposed of in a suitable manner ;

(b) the floor of every work-room shall be cleaned at least once in every week by washing, using disinfectant, where necessary or by some other effective method ;

(c) where a floor is liable to become wet in the course of any manufacturing process to such extent as incapable of being drained, effective means of drainages shall be provided and maintained ;

(d) all inside walls, and partitions, all ceilings or tops of rooms and all walls, sides and tops of passages and staircases shall—

(i) where they are painted otherwise than with washable waterpaint or varnished, be repainted or revarnished at least once in every period of five years ;

(ia) where they are painted with washable waterpaint, be repainted with at least one coat of such paint at least once in every period of three years and washed at least once in every period of six months ;

(ii) where they are painted or varnished or where they have smooth impervious surfaces, be cleanned at least once in every period of fourteen months by such method as may be prescribed ;

(iii) in any other case, be kept white washed or colour washed, and the white washing or colour washing shall be carried out at least once in every period of fourteen months ;

(dd) all doors and window frames and other wooden or metallic frame work and shutters shall be kept painted or varnished and the painting or varnishing shall be carried out at least once in every period of five years ;

(e) the date on which the processes required by clause (d) are carried out shall be entered in the prescribed register.

Section 11(2) lays down, if, in view of the nature of the operations carried on in a factory or class or description of factories or any part of a factory or any class or description of factories, it is not possible for the occupier to comply with all or any of the provisions of sub-section (1), the State Government may by order exempt such factory or class or description of factories or part thereof from any of the provisions of that sub-section and specify alternate methods for keeping the factory in a clean state.

Section 12. Disposal of waste and effluents.—Section 12(1) lays down that effective arrangements shall be made in every factory for the treatment of wastes and effluents due to the manufacturing process carried on therein, so as to render them innocuous, and for their disposal.

Section 12(2) provides that the State Government may make rules prescribing the

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arrangements to be made under sub-section (1) or requiring that the arrangements made in accordance with sub-section (1) shall be approved by such authority as may be prescribed.

Section 13. Ventilation and temperature.—According to Section 13(1) effective and suitable provision shall be made in every factory for securing and maintaining in every work-room—

(a) adequate ventilation by the circulation of fresh air, and

(b) such a temperature as will secure to workers therein reasonable conditions of comfort and prevent injury to health.

It is further provided that walls and roofs shall be of such material and so designed that such temperature shall not be exceeded but kept as low as practicable. Where the nature of the work carried on in the factory involves, or is likely to involve, the production of excessively high temperatures, such adequate measures as are practicable shall be taken to protect the workers therefrom, by separating the process which produces such temperatures from the work-room, by insulating the hot posts or by other effective means.

Section 13(2) empowers the State Government to prescribe a standard of adequate ventilation and reasonable temperature for any factory or class or description of factories or part thereof. The State Government may also direct that proper measuring instruments, at such places and in such position as may be specified, shall be provided and such records, as may be prescribed, shall be maintained.

According to Section 13(3) if it appears to the Chief Inspector that excessively high temperatures in any factory can be reduced by the adoption of suitable measures, he may, without prejudice to the rules made under sub-section (2), serve on the occupier, an order in writing specifying the measures which in his opinion, should be adopted, and requiring them to be carried out before a specified date.

Section 14. Dust and Fume.—Section 14(1) deals with the effective measures which should be adopted to keep the work-rooms free from dust and fume. Every factory in which by reason of the manufacturing process carried on, there is given off any dust or fume or other impurity of such a nature and to such an extent as is likely to be injurious or offensive to the workers employed therein, or any dust in substantial quantities, effective measures shall be taken to prevent its inhalation and accumulation in any work-room. If any exhaust appliance is necessary for the above purposes, it shall be applied as near as possible to the point of origin of the dust, fume or other impurity and such point shall be enclosed as far as possible.

According to Section 14(2) in any factory no stationary internal combustion engine shall be operated unless the exhaust is conducted into the open air, and no other interal combustion engine shall be operated in any room unless effective measures have been taken to prevent such accumulation of fumes therefrom as are likely to be injurious to workers employed in the room.

Section 15. Artificial humidification.—Section 15(1) lays down that in respect of all factories in which the humidity of the air is artificially increased the State Government may make rules—

(a) prescribing standards of humidification ;

(b) regulating the methods used for artificially increasing the humidity of the air ;

(c) directing prescribed tests for determining the humidity of the air to be correctly carried out and recorded ;

(d) prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the work room.

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Section 15(2) lays down that in any factory in which the humidity of the air is artificially increased the water used for the purpose shall be taken from a public supply or other source of drinking water, or shall be effectively purified before it is so used. According to Section 15(3), if it appears to an Inspector that the water used in a factory for increasing humidity which is required to be effectively purified, under sub-section (2) is not effectively purified, he may serve on the manager of the factory an order in writing, specifying the measure, which in his opinion should be adopted and requiring them to be carried out before a specified date.

Section 16. Overcrowding.—Section 16 deals with the general provision relating to overcrowding. According to sub-section (1) no room in any factory shall be overcrowded to an extent injurious to the health of the workers employed therein. Sub-section (2) lays down that there shall be in every work room of a factory in existence on the date of the commencement of this Act at least 9.9. cubic metres and of a factory built after the commencement of this Act at least 14.2 cubic metres of space for every worker employed therein. No account shall be taken of any space which is more than 4.2 metres above the level of the floor of the room, for the purpose of this sub-section.

Section 16(3) lays down that if the Chief Inspector by order in writing so requires there shall be posted on each work-room of a factory a notice specifying the maximum number of workers who may, in compliance with the provisions of this section, be employed in the room. According to Section 16(4) the Chief Inspector may, by order in writing exempt, subject to such conditions as he may think fit to impose, any work-room from the provisions of this, if he is satisfied that compliance therewith in respect of the room is unnecessary in the interest of the health of the workers employed therein.

Section 17. Lighting.—Section 17(1) provides that in every part of the factory, where workers are working or passing, there shall be provided and maintained sufficient and suitable lighting, natural, artificial or both.

Section 17(2) lays down that in every factory all glazed windows and sky-lights used for the lighting of the work rooms shall be kept clean on both the inner and outer surfaces and, so far as compliance with the provisions of any rules made under sub-section (3) of Section 13 will allow, free from obstruction.

Section 17(3) requires that in every factory effective provisions shall so far as practicable, be made for the prevention of—

(a) glare either directly from a source of light or by reflection from a smooth or polished surface ;

(b) the formation of shadows to such an extent as to cause eye-strain or the risk of accident to any worker.

Section 17(4) lays down that the State Government may prescribe standards of sufficient and suitable lighting for factories or for any class or description of factories or for any manufacturing process.

Section 18. Drinking water.—Section 18 deals with the provisions relating to arrangements for drinking water in factories. Sub-section (1) provides that in every factory effective arrangements shall be made to provide and maintain at suitable points conveniently situated for all workers employed therein, a sufficient supply of wholesome drinking water.

Sub-section (2) provides that all such points shall be legibly marked "drinking water" in a language understood by a majority of the workers employed in the factory and no such point shall be situated within six metres of any washing place, urinal, latrine, spittoon, open drain carrying sullage or effluent or any other source of contamination unless a shorter distance is approved in writing by the Chief Inspector.

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Sub-section (3) lays down that in every factory wherein more than two hundred and fifty workers are ordinarily employed, provisions shall be made for cooling drinking water during hot weather by effective means and for distribution thereof. Sub-section (4) authorises the State Government to make rules, in respect of all factories or any class or description of factories, for securing compliance with the provisions of sub-sections (1), (2) and (3). The State Government may also make rules for the examination by the prescribed authorities of the supply and distribution of drinking water in factories.

Section 19. Latrines and urinals.—Section 19(1) provides that in every factory—

(a) sufficient latrine and urinal accommodation of prescribed type shall be provided conveniently situated and accessible to workers at all times while they are at the factory ;

(b) separate enclosed accommodation shall be provided for male and female workers ;

(c) such accommodation shall be adequately lighted and ventilated, and no latrine or urinal, shall, unless specially exempted in writing by the Chief Inspector, communicate with any workroom except through an intervening open space or ventilated passage ;

(d) all such accommodation shall be maintained in a clean and sanitary condition at all times ;

(e) sweepers shall be employed whose primary duty would be to keep clean latrines, urinals and work-places.

Sub-section (2) of Section 19 lays down that in every factory wherein more than two hundred and fifty workers are ordinarily employed—

(a) all latrine and urinal accommodation shall be of prescribed sanitary types ;

(b) the floors and internal walls upto a height of ninety centimetres of the latrines and urinals and the sanitary block shall be laid in glazed tiles or otherwise finished to provide a smooth polished impervious surface ;

(c) without prejudice to the provisions of clauses (d) and (e) of sub-section (1) the floors, partitions of the walls and blocks so laid or finished and the sanitary pans of latrine and urinals shall be thoroughly washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.

Sub-section (3) of Section 19 provides that the State Government may prescribe the number of latrines and urinals to be provided in any factory in proportion to the number of male and female workers ordinarily employed therein, and provide for such further matters in respect of sanitation in factories, including the obligation of workers in this regard, as it considers necessary in the interests of the workers employed therein.

Section 20. Spittoons.—Section 20(1) lays down that in every factory there shall be provided a sufficient number of spittoons in convenient places. They shall be maintained in a clean and hygienic condition. Section 20(2) authorises the State Government to make rules prescribing the type and the number of spittoons to be provided and their location in any factory and to provide for such further matters relating to their maintenance in a clean and hygienic condition. Section 20(3) lays down that a person shall not spit within the premises of a factory except in the spittoons provided for the purpose and a notice containing this provision and the penalty for its violation shall be prominently displayed at suitable places in the premises. It is further provided by Section 20(4) that whoever spits in contravention of sub-section (3) shall be punishable with fine not exceeding five rupees.

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CHAPTER IV
SAFETY

Section 21. Fencing of machinery.—According to Section 21(1) in every factory the following shall be securely fenced by safeguards of substantial construction which shall be constantly maintained and kept in position while the parts of machinery they are fencing are in motion or in use :—

(i) every moving part of a prime mover and every flywheel connected to a prime mover, whether the prime mover or flywheel is in the engine house or not ;

(ii) headrace and trailrace of every water-wheel and water-turbine ;

(iii) any part of a stock bar which projects beyond the head stock of a lathe ; and

(iv) unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced, the following shall also be securely fenced :—

(a) every part of an electric generator, a motor or rotary converter ;

(b) every part of transmission machinery ; and

(c) every dangerous part of any other machinery :

Provided that for the purpose of determining whether any part of machinery is in such position or is of such construction as to be safe as aforesaid, account shall not be taken of any occasion when—

(i) it is necessary to make an examination of any part of the machinery aforesaid while it is in motion or, as a result of such examination, to carry out lubrication or other adjusting operation while the machinery is in motion, being an examination or operation which it is necessary to be carried out while that part of the machinery is in motion, or

(ii) in the case of any part of a transmission machinery used in such process as may be prescribed (being a process of a continuous nature the carrying on of which shall be, or is likely to be, substantially interfered with by the stoppage of that part of the machinery), it is necessary to make an examination of such part of the machinery while it is in motion or, as a result of such examination, to carry out any mounting or shipping or belts or lubrication or other adjusting operation while the machinery is in motion,

and such examination or operation is made or carried out in accordance with the provisions of sub-section (1) of Section 22.

Section 21(2) lays down that the State Government may by rules prescribe such further precautions as it may consider necessary in respect of any particular machinery or exempt, subject to such conditions as may be prescribed for securing the safety of the workers, any particular machinery or part thereof from the provisions of this section.

Though the words "shall be securely fenced" in clause (iv)(c) of Section 21(1) suggest that the fencing should always be there, the statute has put the matter beyond doubt by expressly saying that the fencing shall be kept in position while the machine is working. When the statute says that it will be the duty of the occupier or the manager to keep the guard in position when the machine is working and when it appears that he

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has not done so, it will be for him to establish that notwithstanding this he was not liable.[1]

Where, therefore, the prosecution establishes the default of not fencing the dangerous part of a machine while in motion, the occupier or the manager has to show that he has done everything to carry out his duty to see that the guard was kept in position when the machine was working. The onus to prove that is on him because his defence depends on it. Where he simply pleads that he did not know who removed the guard provided for the machine he fails to discharge the onus on him and is liable under Section 92 of the Act for having failed to carry out the terms of Section 21(1)(iv)(c). The mere fact that someone else had removed the safeguard without the knowledge, consent or connivance of the occupier or manager does not provide a defence to him.[2]

Where the statute provides that it shall be the duty of the occupier or the manager to keep the guard in position when the machine is working and when it appears that he has failed to do so, it will then be for him to establish that notwithstanding this he is not liable. Therefore, where the prosecution establishes the default of not fencing the dangerous part of machine while in motion the occupier or the manager has to show that he has done everything to carry out his duty to see that the guard was kept in position when the machine was working.[3] The onus to prove this is on him because his defence depends on it. It was held in *Caroll* v. *Andrew Barelay and Sons Ltd.*,[4] that the duty under Section 21 is not only confined to shutting off the employee from danger, but includes shutting in the machinery so that it cannot fly out and strike the workman if it breaks.

In *Walker* v. *Bletechley Flettans Ltd.*,[5] it was held that a machine is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur. In *Mitchell* v. *North British Rubber Co. Ltd.*[6] a machine was also held to be dangerous if in the ordinary course of human affairs, danger may be reasonably anticipated from its use if unfenced, not only to the prudent or alert but also to the careless or inattentive worker whose inadvertent conduct may expose him to risk of injury from the unguarded part.

Section 22. Work on or near machinery in motion.—Section 22(1) lays down that where in any factory it becomes necessary to examine any part of the machinery referred to in Section 21 while the machinery is in motion, or as a result of such examination to carry out—

(a) in a case referred to in clause (i) of the proviso to sub-section (1) of Section 21, lubrication or other adjusting operation ; or

(b) in a case referred to in clause (ii) of the proviso aforesaid, any mounting or shipping of belts or lubrication or other adjusting operation,

while the machinery is in motion such examination or operation shall be made or carried out only by a specially trained adult male worker wearing tight fitting clothing (which shall be supplied by the occupier) whose name has been recorded in the register prescribed in this behalf and who has been furnished with a certificate of his appointment, and while he is so engaged,—

(a) such worker shall not handle a belt at a moving pulley unless—

(i) the belt is not more than fifteen centimetres in width ;

1. *State of Gujarat* v. *Jethalal*, AIR 1964 SC 779.
2. *Ibid.*
3. *State of Gujarat* v. *Jethalal*, AIR 1964 SC 779.
4. (1949-50) 1 FJR 1.
5. (1973) 1 All ER 170.
6. 1954 SCJ 73.

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(ii) the pulley is normally for the purpose of drive and not merely a fly-wheel or balance wheel (in which case a belt is not permissible) ;

(iii) the belt joint is either laced or flushed with the belt ;

(iv) the belt, including the joint and the pulley rim, are in good repair ;

(v) there is reasonable clearness between the pulley and any fixed plant or structure ;

(vi) secure foothold and, where necessary, secure hand hold, are provided for the operator ; and

(vii) any ladder, in use for carrying out any examination or operation aforesaid is securely fixed or lashed, is firmly held by a second person ;

(b) without prejudice to any other provision of this Act relating to the fencing of machinery, every set screw, bolt and key on any revolving shaft, spindle, wheel or pinion and all spur worm and other toothed or friction gearing in motion with which such worker would otherwise be liable to come into contact, shall be securely fenced to prevent such contact.

Section 22(2) provides that no woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery.

Section 22(3) empowers the State Government to prohibit, by notification in the official Gazette, in any specified factory or class or description of factories, the cleaning, lubricating or adjusting by any person of specified part of machinery when those parts are in motion.

Section 23. Employment of young persons on dangerous machine.—According to Section 23(1) no young person shall be required or allowed to work at any machine to which this section applies ; unless :—

(a) he has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed ; and

(b) (i) has received sufficient training in work at the machine ; or

(ii) is under adequate supervision by a person who has a thorough knowledge and experience of the machine.

Section 23(2) lays down that sub-section (1) shall apply to such machines as may be prescribed by the Government being machines which in its opinion are of such a dangerous character that young persons ought not to work at them unless the foregoing requirements are complied with.

Section 24. Striking gear and devices for cutting of power.—In every factory—

(a) suitable striking gear or other efficient mechanical appliance shall be provided and maintained and used to move driving belts to and from part of the transmission machinery, and such gear or appliance shall be so constructed, placed and maintained as to prevent the belt from creeping back on to the fast pulley ;

(b) driving belts when not in use shall not be allowed to rest or ride upon shafting in motion.

Section 24(2) provides that in every factory suitable devices for cutting off power in emergency from transmission machinery shall be provided and maintained in every

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work-room. But in respect of factories in operation before the commencement of this Act, the provisions of this sub-section shall apply only to work-room in which electricity is used as power.

Sub-section (3) provides that when a device, which can inadvertently shift from "off" to "on" position, is provided in a factory to cut off power, arrangements shall be provided for locking the device in safe position to prevent accidental starting of the transmission machinery or other machines to which the device is fitted.

Section 25. Self-acting machines.—No traversing part of a self-acting machine in any factory and no material carried thereon shall, if the space over which it runs is a space over which any person is liable to pass, whether in course of his employment or otherwise, be allowed to run on its outward or inward traverse within a distance of forty five centimetres from any fixed structure which is part of the machine. But the Chief Inspector may permit the continued use of a machine installed before the commencement of this Act which does not comply with the requirements of this section on such conditions for ensuring safety as he may think fit to impose.

Section 26. Casing of new machinery.—Section 26(1) provides that in all machinery driven by power and installed in any factory after commencement of this Act—

(a) every set screw, bolt or key on any revolving shaft, spindle wheel or opinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger ;

(b) all spur, worm and other toothed or friction gearing which does not require frequent adjustment while in motion be completely encased unless it is situated as to be as safe as it would be if it were completely encased.

Sub-section (2) of Section 26 provides, whoever sells or lets on hire or, as agent of a seller or hirer causes or procures to be sold or let on hire, in a factory any machinery driven by power which does not comply with the provisions of sub-section (1) or any rules made under sub-section (3), shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.

Section 26(3) authorises the State Government to make rules specifying further safeguards to be provided in respect of any other dangerous part of any particular machine or class or description of machines and specifying the types of safeguards to be provided thereon.

Section 27. Prohibitions of employment of women and children near cotton openers.—Section 27 lays down that no women or children shall be employed to any part of a factory for pressing cotton in which a cotton opener is at work. But if the feed end of a cotton-opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the Inspector may in any particular case specify in writing, women and children may be employed on the side of the partition where the feed end is situated.

Section 28. Hoists and lifts.—According to Section 28 in every factory every hoist and lift shall be—

(i) of good mechanical construction, sound material and adequate strength ;

(ii) properly maintained, and shall be thoroughly examined by a competent person at least once in every period of six months and a register shall be kept containing the prescribed particulars of every such examination ;

It is further provided that in every factory—

(i) every hoistway and liftway shall be sufficiently protected by an enclosure fitted with gates and the hoist or lift and every such enclosure shall be so

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constructed as to prevent any person or thing from being trapped between any part of the hoist or lift and any fixed structure of moving part ;

(ii) the maximum safe working load shall be plainly marked on every hoist or lift, and no load greater than such load shall be carried thereon ;

(iii) the cage of every hoist or lift used for carrying persons shall be fitted with a gate on each side from which access is afforded to a landing ;

(iv) every gate referred to in clause (i) or clause (iii) above shall be fitted with inter-locking or other efficient device to secure that the gate cannot be opened except when the cage is at the landing and that the cage cannot be moved unless the gate is closed.

According to Section 28(2) the following additional requirements shall apply to hoists and lifts used for carrying persons and installed or reconstituted in a factory after the commencement of this Act, namely—

(a) where the cage is supported by rope or chain there shall be at least two ropes, or chains separately connected with the cage and balance weight, and each rope or chain with its attachments shall be capable of carrying the whole of the cage together with its maximum load ;

(b) efficient devices shall be provided and maintained capable of supporting the cage together with its maximum load in the event of breakage of ropes, chains or attachments ;

(c) an efficient automatic device shall be provided and maintained to prevent the cage from overrunning.

Section 28(3) authorises the Chief Inspector to permit the continued use of a hoist or lift installed in a factory before the commencement of this Act which does not fully comply with the provisions of sub-section (1) upon such conditions for ensuring safety as he may think fit to impose. Section 28(4) lays down that the State Government may, if, in respect of any class or description of hoist or lift, it is of opinion that it would be unreasonable to enforce any requirement of sub-sections (1) and (2) by order direct that such requirement shall not apply to such class or description of hoist or lift.

Explanation.—For the purposes of this section, no lifting machine or appliance shall be deemed to be a hoist or lift unless it has a platform or cage, the direction or movement of which is restricted by a guide or guides.

Section 29. Lifting machines, chains, ropes and lifting tackles.—According to Section 29(1) in any factory, the following provision shall be complied with in respect of every lifting machine (other than hoist or lift) and every chain, rope and lifting tackle for the purpose of raising and lowering persons, goods or materials :

(a) all parts including the working gear, whether fixed or immovable of every lifting machine and every chain, rope or lifting tackle shall be—

(i) of good construction, sound material and adequate strength and free from defects ;

(ii) properly maintained ; and

(iii) thoroughly examined by a competent person once in every period of twelve months, or at such intervals as the Chief Inspector may specify in writing and a register shall be kept containing the prescribed particulars of every such examination ;

(b) no lifting machine and no chain, rope or lifting tackle shall, except for the purpose of test, be loaded beyond the safe working load which shall be plainly shown thereon together with an identification mark and duly entered in the prescribed register ; and where this is not practicable, a table showing the safe working loads of every kind and size of lifting machine or chain,

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rope of lifting tackle in use shall be displayed in prominent positions on the premises ;

(c) while any person is employed or working on or near the wheel track of a travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken to ensure that the crane does not approach within six metres of the place.

Section 29(2) empowers the State Government to make rules in respect of any lifting machine or any chain, rope or lifting tackle used in factories—

(a) prescribing further requirement to be complied with in addition to those set out in this section ;

(b) providing for exemption from compliance with all or any of the requirements of this section, where, in its opinion, such compliance is unnecessary or impracticable.

Section 29(3) lays down that for the purposes of this section a lifting machine, or a chain, rope or lifting tackle shall be deemed to have been thoroughly examined if a visual examination supplemented, if necessary, by other means and by the dismantling of parts of the gear, has been carried out as carefully as the conditions permit in order to arrive at a reliable conclusion as to the safety of the parts examined.

Explanation.—In this section—

(a) "lifting machine" a crane, crab, wheel, teagle, pulley, block gin-wheel, transport or runway ;

(b) "lifting tackle" means any chain sling, rope sling, hook, shackle, swivel, coupling, socket, clamp, tray or similar appliance, whether fixed or movable, used in connection with the raising or lowering of persons, or loads by use of lifting machines.

Section 30. Revolving machinery.—Section 30(1) provides that in every factory in which the process of grinding is carried on, there shall be permanently affixed to or placed near each machine in use a notice indicating the maximum safe working peripheral speed of every grindstone or abrasive wheel, the speed of the shaft or spindle upon which the wheel is mounted and the diameter of the pulley upon such shafts or spindle necessary to secure such safe working peripheral speed.

According to Section 30(2) the speeds indicated in notices under sub-section (1) shall not be exceeded. According to sub-section (3) of Section 30, effective measures shall be taken in every factory to ensure that the safe working peripheral speed of every revolving vessel, cage, basket, fly-wheel, pulleys, disc or similar appliance driven by power is not exceeded.

Section 31. Pressure plant.—Section 31(1) lays down that if in any factory any plant or machinery or any part thereof is operated at a pressure above atmosphere pressure, effective measures shall be taken to ensure that the safe working pressure of such plant or machinery or part is not exceeded. Section 31(2) empowers the State Government to make rules providing for the examination and testing of any plant or machinery such as is referred to in sub-section (1) and prescribing such other safety measures in relation thereto as may in its opinion be necessary in any factory or class or description of factories. Sub-section (3) provides that the State Government may, by rules, exempt, subject to such conditions as may be specified therein, any part of any plant or machinery referred to in sub-section (1) from the provisions of this section.

Section 32. Floors, stairs and means of access.—Section 32 provides that in every factory—

(a) all floors, steps, stairs and gangways shall be of sound construction and properly maintained and shall be kept free from obstructions and substances

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likely to cause persons to slip and where it is necessary to ensure safety steps, stairs, passage and gangways shall be provided with substantial handrails ;

(b) there shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person is at any time required to work ;

(c) when any person has to work at a height from where he is likely to fall, provisions shall be made, so far as is reasonably practicable, by fencing or otherwise, to ensure the safety of the person so working.

It was held in *Davies* v. *Havill and Aircraft Co. Ltd.*[1] that, no breach of statutory duty imposed under this section is occasioned if an injury is caused by accumulation of rain water in little depression in the concrete of the passage. In *Cole* v. *Blackstone Co. Ltd.*[2] it was held that the obligation imposed by this section is not discharged by saying that the occupier has taken all practical steps to ascertain the goodness and efficiency.

Section 33. Pits, sumps, opening in floors, etc.—Section 33(1) provides that in every factory every fixed vessel, sump, tank, pit or opening in the ground or in a floor which, by reason of its depth, situation, construction or contents is or may be a source of danger, shall be either securely covered or securely fenced. Section 33(2) empowers the State Government to, by order in writing exempt, subject to such condition as may be prescribed, any factory, or class or description of factories in respect of any vessel, sump, tank, pit or opening from compliance with the provisions of this section.

Section 34. Excessive weights.—Section 34(1) lays down that no person shall be employed in any factory to lift, carry or move any load so heavy as to be likely to cause him injury. Section 34(2) authorises the State Government to make rules prescribing the minimum weights which may be lifted, carried or moved by adult men, adult women, adolescents and children employed in factories or in any class or description of factories or in carrying on any specified process.

Section 35. Protection to eyes.—Section 35 provides that in respect of any such manufacturing process carried on in any factory as may be prescribed, the State Government may by rules require that effective screens or suitable goggles shall be provided for the protection of persons employed on, or in the immediate vicinity of the process, provided such process involves :—

(a) risk of injury to the eyes from particles or fragments thrown off in the course of the process, or

(b) risk to the eyes by reason of exposure to excessive light.

In *Finch* v. *Telegraph Construction and Maintenance Co. Ltd.*[3] it was held that hanging of goggles in the office room is not enough, but the workers must be informed of their whereabouts, only then the requirements of Section 35 can be said to have been complied with.

Section 36. Precautions against dangerous fumes, gases, etc.—(1) No person shall be required or allowed to enter any chamber, tank, vat, pit, pipe, flue or other confined space in any factory in which any gas, fume, vapour, or dusts is likely to be present to such an extent as to involve risk to persons being overcome thereby, unless it is provided with a manhole of adequate size or other effective means of egress.

(2) No person shall be required or allowed to enter any confined space as is referred to in sub-section (1), until all practicable measures have been taken to remove any gas, fume, vapour or dust, which may be present so as to bring its level within the

1. (1950) 2 All ER 582.
2. (1954) 1 KB 615.
3. (1949) 1 All ER 452.

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permissible limits and to prevent any ingress of such gas, fume, vapour or dust and unless—

(a) a certificate in writing has been given by a competent person, based on a test carried out by himself that the space is reasonably free from dangerous gas, fume, vapour or dust ; or

(b) such person is wearing suitable breathing apparatus and a belt securely attached to a rope the free end of which is held by a person outside the confined space.

Section 36-A. Precautions regarding the use of portable electric light.—In any factory (a) no portable electric light or any other electric appliance of voltage exceeding twenty-four volts shall be permitted for use inside any chamber, tank, vat, pit, pipe, flue or other confined space unless adequate safety devices are provided and (b) if any inflammable gas, fume or dust is likely to be present in such chamber, tank, vat, pipe, flue or other confined space, no lamp or light other than that of flame-proof construction shall be permitted to be used therein.

Section 37. Explosive or inflammable dust, gas, etc.—Section 37(1) lays down that wherein any factory any manufacturing process produces dust, gas, fume or vapour of such character and to such extent as to be likely to explode on ignition, all practicable measures shall be taken to prevent any such explosion by—

(a) effective enclosure of the plant or machinery used in the process ;

(b) removal or prevention of the accumulation of such dust, gas, fume or vapour ;

(c) exclusion or effective enclosure of all possible sources of ignition.

Section 37(2) provides that where in any factory the plant or machinery used in a process such as is referred to in sub-section (1) is not so constructed as to withstand the probable pressure which such an explosion as aforesaid would produce, all practicable measures shall be taken to restrict the spread and effects of explosion by the provision in the plant or machinery, or chokes, baffles, vents or other effective appliances.

According to Section 37(3) where any part of the plant or machinery in a factory contains any explosive or inflammable gas or vapour under pressure greater than atmospheric pressure, that part shall not be opened except in accordance with the following provisions, namley—

(a) before the fastening of any joint of any pipe, connected with the part or the fastening of the cover of any opening into the part is loosened any flow of the gas or vapour into the part of any such pipe shall be effectively stopped by a stopvalve or other means ;

(b) before any such fastening as aforesaid is removed, all practicable measures shall be taken to reduce the pressure of the gas or vapour in the part of pipe to atmospheric pressure ;

(c) where any such fastening as aforesaid has been loosened or removed effective measures shall be taken to prevent any explosive or inflammable gas or vapour from entering the part of pipe until the fastening has been secured or, as the case may be, securely replaced.

But the provisions of sub-section (3) shall not apply in the case of plant or machinery installed in the open air.

Section 37(4) lays down that no plant, tank or vessel which contains or has contained any explosive or inflammable substance shall be subjected in any factory to any welding, brazing, soldering or cutting operation which involves the application of heat unless adequate measures have first been taken to remove such substance and any

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fumes arising therefrom or to render such substance and any fumes non-explosive or non-inflammable, and no such substance shall be allowed to enter such plant, tank or vessel after any such operation until the metal has cooled sufficiently to prevent any risk of igniting the substance.

Section 37(5) authorises the State Government to exempt, by making rules subject to such conditions as may be prescribed, factory or class or description of factories from compliance with all or any of the provisions of this section.

Section 38. Precautions in case of fire.—(1) In every factory, all practicable measures shall be taken to prevent outbreak of fire and its spread, both internally and externally, and to provide and maintain—

(a) safe means of escape for all persons in the event of a fire, and

(b) the necessary equipment and facilities for extinguishing fire.

(2) Effective measures shall be taken to ensure that in every factory all the workers are familiar with the means of escape in case of fire and have been adequately trained in the routine to be followed in such cases.

(3) The State Government may make rules, in respect of any factory or class or description of factories, requiring the measures to be adopted to give effect to theprovisions of sub-section (1) and (2).

(4) Notwithstanding, anything contained in clause (a) of sub-section (1) or sub-section (2), if the Chief Inspector, having regard to the nature of the work carried on in any factory, the construction of such factory, special risk to life or safety, or any other circumstances, is of the opinion that the measures provided in the factory, whether as prescribed or not, for the purposes of clauses (a) of sub-section (1) or sub-section (2), are inadequate, he may by order in writing, require that such additional measures as he may consider reasonable and necessary, be provided in the factory before such date as is specified in this order.

Section 39. Power to require specifications of defective parts or test of liability.—Under Section 39 if it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life or safety, he may serve on the occupier or manager or both of the factory an order in writing requiring him before a specified date—

(a) to furnish drawings, specifications and other particulars as may be necessary to determine whether such building, ways, machinery or plant can be used with safety, or

(b) to carry out such tests in such manner as may be specified in the order, and inform the Inspector of the results thereof.

Section 40. Safety of building and machinery.—Under Section 40(1) if it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such condition that it is dangerous to human life or safety, he may serve on the occupier or manager or both of the factory an order in writing specifying the measure which in his opinion shall be adopted and requiring them to be carried out before a specified date.

According to Section 40(2) if it appears to the Inspector that the use of any building or part of a building or any part of the ways, machinery or plant in a factory involves imminent danger to human life or safety, he may serve on the occupier or manager or both of the factory an order in writing prohibiting its use until it has been properly repaired or altered.

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Section 39 and 40 are similar in so far as both deal with the safety provisions of building and machinery ; but Section 39 contemplates a possibility of danger, while

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Section 40 contemplates of danger which is imminent or existing.

Section 40-A. Maintenance of buildings.—If it appears to the Inspector that any building or part of a building in a factory is in such a state of disrepair as is likely to lead to conditions detrimental to the health and welfare of the workers, he may serve on the occupier or manager or both of the factory an order in writing specifying the measures which in his opinion should be taken and requiring the same to be carried out before such date as is specified in the order.

Section 40-B. Safety Officers.—(1) In every factory—

(i) wherein one thousand or more workers are ordinarily employed ; or

(ii) wherein, in the opinion of the State Government any manufacturing process or operation is carried on, which process or operation involves any risk of bodily injury, poisoning or disease or any other hazard to health, to the persons employed in the factory ; the occupier shall, if so required by the State Government by notification in the Official Gazette, employ such number of Safety Officers as may be specified in that notification.

(2) The duties, qualifications and conditions of service of Safety Officers shall be such as may be prescribed by the State Government.

Section 41. Power to make rules to supplement this chapter.—Section 41 of the Act empowers the State Government to make rules requiring the provisions in any factory or in any class or description of factories of such further devices and measures for securing the safety of person employed therein as it may deem necessary.

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CHAPTER IV-A
PROVISIONS RELATING TO HAZARDOUS PROCESSES

Section 41-A. Constitution of site appraisal committee.—(1) The State Government may, for purposes of advising it to consider applications for grant of permission for the initial location of a factory involving hazardous process or for the expansion of any such factory, appoint a Site Appraisal Committee consisting of—

(a) the Chief Inspector of the State who shall be its Chairman ;

(b) a representative of the Central Board for the Prevention and Control of Water Pollution appointed by the Central Government under Section 3 of the Water (Prevention and Control of Pollution) Act, 1974 ;

(c) a representative of the Central Board for the Prevention and Control of Air Pollution referred to in Section 3 of the Air (Prevention and Control of Pollution) Act, 1981 ;

(d) a representative of the State Board appointed under Section 4 of the Water (Prevention and Control of Pollution) Act, 1974 ;

(e) a representative of the State Board for the Prevention and Control of Air Pollution referred to in Section 5 of the Air (Prevention and Control of Pollution) Act, 1981 ;

(f) a representative of the Department of Environment in the State ;

(g) a representative of the Meterological Department of the Government of India.

(h) an expert in the field of occupational health ; and

(i) a representative of the Town Planning Department of the State Government, and not more than five other members who may be co-opted by the State Government who shall be—

(i) a scientist having specialised knowledge of the hazardous process which will be involved in the factory,

(ii) a representative of the local authority within whose jurisdiction the factory is to be establsihed, and

(iii) not more than three other persons as deemed fit by the State Government.

(2) The Site Appraisal Committee shall examine an application for the establishment of a factory involving hazardous process and make its recommendation to the State Government within a period of ninety days of the receipt of such application in the prescribed form.

(3) Where any process relates to a factory owned or controlled by the Central Government or to a corporation or a company owned or controlled by the Central Government, the State Government shall co-opt in the Site Appraisal Committee a representative nominated by the Central Government as a member of that Committee.

(4) The State Appraisal Committee shall have power to call for any information from the person making an application for the establishment or expansion of a factory involving a hazardous process.

(5) Where the State Government has granted approval to an application for the establishment or expansion of a factory involving a hazardous process, it shall not be

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necessary for an applicant to obtain a further approval from the Central Board or the State Board established under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981.

Section 41-B. Compulsory disclosure of information by the occupier.—(1) The occupier of every factory involving a hazardous process shall disclose in the manner prescribed all information regarding dangers, including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes, to the workers employed in the factory, the Chief Inspector, the local authority within whose jurisdiction the factory is situate and the general public in the vicinity.

(2) The occupier shall, at the time of registering the factory involving a hazardous process, lay down a detailed policy with respect to the health and safety of the workers employed therein and intimate such policy to the Chief Inspector and the local authority and thereafter, at such intervals as may be prescribed, inform the Chief Inspector and the local authority of any change made in the said policy.

(3) The information furnished under sub-section (1), shall include accurate information as to the quantity, specifications and other characteristics of wastes and the manner of their disposal.

(4) Every occupier shall, with the approval of the Chief Inspector, draw up an on site emergency plan and detailed disaster control measures for his factory and make known to the workers employed therein and to the general public living in the vicinity of the factory the safety measures required to be taken in the event of an accident taking place.

(5) Every occupier of a factory shall,—

(a) if such factory is engaged in a hazardous process on the commencement of the Factories (Amendment) Act, 1987 within a period of thirty days of such commencement ; and

(b) if such factory proposes to engage in a hazardous process at any time after such commencement, within a period of thirty days before the commencement of such process,

inform the Chief Inspector of the nature and details of the process in such form and in such manner as may be prescribed.

(6) Where any occupier of a factory contravenes the provisions of sub-section (5), the licence issued under Section 6 to such factory shall, notwithstanding any penalty to which the occupier or factory shall be subjected to under the provisions of this Act, be liable for cancellation.

(7) The occupier of a factory involving a hazardous process shall, with the previous approval of the Chief Inspector, lay down measures for the handling, usage, transportation and storage of hazardous substances inside the factory premises and the disposal of such substances outside the factory premises and publicise them in the manner prescribed among the workers and the general public living in the vicinity.

Section 41-C. Specific responsibility of the occupier in relation to hazardous processes.—Every occupier of a factory involving any hazardous process shall—

(a) maintain accurate and up-to-date health records or, as the case may be, medical records, of the workers in the factory who are exposed to any chemical, toxic or any other harmful substances which are manufactured, stored, handled or transported and such records shall be accessible to the workers subject to such conditions as may be prescribed ;

(b) appoint persons who possess qualifications and experience in handling hazardous substances and are competent to supervise such handling within

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the factory and to provide at the working place all the necessary facilities for protecting the workers in the manner prescribed :

Provided that where any question arises as to the qualifications and experience of a person so appointed, the decision of the Chief Inspector shall be final :

(c) provide for medical examination of every worker—

(i) before such worker is assigned to a job involving the handling of, or working with, a hazardous substance, and

(ii) while continuing in such job, and after he has ceased to work in such job, at intervals not exceeding twelve months, in such manner as may be prescribed.

Section 41-D. Power of Central Government to appoint Inquiry Committee.—(1) The Central Government may, in the event of the occurrence of an extraordinary situation involving a factory engaged in a hazardous process, appoint an Inquiry Committee to inquire into the standards of health and safety observed in the factory with a view to finding out the causes of any failure or neglect in the adoption of any measures or standards prescribed for the health and safety of the workers employed in the factory or the general public affected, or likely to be affected, due to such failure or neglect and for the prevention and recurrence of such extraordinary situations in future in such factory or elsewhere.

(2) The Committee appointed under sub-section (1) shall consist of a Chairmn and two other members and the terms of reference of the Committee and the tenure of office of its members shall be such as may be determined by the Central Government according to the requirements of the situation.

(3) The recommendations of the Committee shall be advisory in nature.

Section 41-E. Emergency standards.—(1) Where the Central Government is satisfied that no standards of safety have been prescribed in respect of a hazardous process or class of hazardous processes, or where the standards so prescribed are inadequate, it may direct the Director-General of Factory Advice Service and Labour Institutes or any institution specialised in matters relating to standards of safety in hazardous processes, to lay down emergency standards for enforcement of suitable standards in respect of such hazardous processes.

(2) The emergency standards laid down under sub-section (1) shall, until they are incorporated in the rules made under this Act, be enforceable and have the same effet as if they had been incorporated in the rules made under this Act.

Section 41-F. Permissible limits of exposure of chemical and toxic substances.—(1) The maximum permissible threshold limits of exposure of chemical and toxic substances in manufacturing processes (whether hazardous or otherwise) in any factory shall be of the value indicated in the Second Schedule.

(2) The Central Government may, at any time, for the purposes, of giving effect to any scientific proof obtained from specialised institutions or experts in the field, by notification in the official Gazette, make suitable changes in the said Schedule.

Section 41-G. Work's participation in safety management.—(1) The occupier shall, in every factory, where a hazardous process takes place, or where hazardous substances are used or handled, set up a Safety Committee consisting of equal number of representative of workers and management to promote co-operation between the workers and the management in maintaining proper safety and health at work and to review periodically the measure taken in that behalf :

Provided that the State Government may, by order in writing and for reasons to be recorded, exempt the occupier of any factory or class of factories from setting up such Committee.

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(2) The composition of the Safety Committee, the tenure or office of its members and their rights and duties shall be such as may be prescribed.

Section 41-H. Right of workers to warn about imminent danger.—(1) Where the workers employed in any factory engaged in a hazardous process have reasonable apprehension that there is a likelihood of imminent danger to their lives or health due to any accident, they may bring the same to the notice of the occupier, agent, manager or any other person who is incharge of the factory or the process concerned directly or through their representatives in the Safety Committee and simultaneously bring the same to the notice of the Inspector.

(2) It shall be the duty of such occupier, agent, manager or the person incharge of the factory or process to take immediate remedial action if he is satisfied about the existence of such imminent danger and send a report forthwith of the action taken to the nearest Inspector.

(3) If the occupier, agent, manager or the person incharge referred to in sub-section (2) is not satisfied about the existence of any imminent danger as apprehended by the worker, he shall, nevertheless, refer the matter forthwith to the nearest Inspector whose decision on the question of the existence of such imminent danger shall be final.

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CHAPTER V
WELFARE

Section 42. Washing facilities.—The importance of washing facilities was emphasised by the Royal Commission in the following words :—

"The provision of suitable washing facilities for all employees is desirable, and here many factories are deficient. The workers who live in crowded areas have inadequate facilities for washing at their homes and bathing facilities would add to their comfort, health and efficiency. We recommended that for workers engaged in dirty process, the provision for washing place and water should be made obligatory".

Section 42(1) provides that in every factory—

(a) adequate and suitable facilities for washing shall be provided and maintained for the use of workers ;

(b) separate and adequately screened facilities shall be provided for the use of male and female workers ;

(c) such facilities shall be conveniently accessible and shall be kept clean.

Section 42(2) authorises the State Government to prescribe, in respect of any factory or class or description of factories, or of any manufacturing process, standards of adequate and suitable facilities for washing.

Section 43. Facilities for storing and drying clothing.—Section 43 empowers the State Government to make rules, in respect of any factory or class or description of factories, requiring the provision therein of suitable places for keeping clothing not worn during working hours and for the drying of wet clothing.

Section 44. Facilities for sitting.—According to Section 44(4) in every factory suitable arrangements for sitting shall be provided and maintained for all workers obliged to work in a standing position, in order that they may take advantage of any opportunities for rest which may occur in the course of their work.

According to Section 44(2) if in the opinion of the Chief Inspector, the workers of any factory engaged in a particular manufacturing process or working in a particular room are able to do their work efficiently in a sitting position, he may by order in writing, require the occupier of the factory to provide before a specified date such seating arrangements as may be practicable for all workers so engaged or working.

Section 44(3) empowers the State Government to declare, by notification in the official Gazette, that the provisions of sub-section (1) shall not apply to any specified factory or class or description of factories or to any specified manufacturing process.

Section 45. First-aid appliances.—According to Section 45(1) in every factory shall be provided and maintained so as to be readily accessible during all working hours first-aid boxes or cupboards equipped with the prescribed contents and the number of such boxes or cupboards to be provided and maintained shall not be less than one for every one hundred and fifty workers ordinarily employed at any one time in the factory.

Section 45(2) provides that nothing except the prescribed contents shall be kept in a first-aid box or cupboard.

According to Section 45(3) each first-aid box or cupboard shall be kept in the charge of a separate responsible person who holds a certificate in first aid treatment recognised by the State Government and who shall always be readily available during

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the working hours of the factory.

Section 45(4) says that in every factory wherein more than five hundred workers are ordinarily employed there shall be provided and maintained an ambulance room of the prescribed size, containing the prescribed equipment and in the charge of such medical and nursing staff as may be prescribed and those facilities shall always be made readily available during the working hours of the factory.

Section 46. Canteens.—The State Government may, according to Section 46(1), make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.

Thus sub-section (1) confers general rule-making power upon the State Government and sub-section (2) of Section 46 authorised the State Government to make rules providing for—

(a) the date by which canteen shall be provided ;

(b) the standards in respect of construction, accommodation, furniture and other equipment of the canteen ;

(c) the foodstuffs to be served therein and the charges which may be made thereof ;

(d) the constitution of a managing committee for the canteen and representation of the workers the management of the canteen ;

(dd) the items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the employer ;

(e) delegation to the Chief Inspector, subject to such conditions as may be prescribed, of the powers to make rules under clause (c).

It is true that so far as the employer is concerned where the staff canteen has to be provided in pursuance of this section it must be run on a no profit basis as prescribed by sub-rule (2) of Rule 85. But a contractor who conducts the canteen not out of any philanthropic considerations but for profit carries on a trade of keeping a catering establishment, for which he must obtain a licence, if provided under the relevant statute.[1]

In *Kanpur Suraksha Karmachari Union etc.* v. *The Union of India etc.*,[2] the employees working in canteen established in certain Defence Industrial Installations under Section 46 of the Factories Act, 1948 were by a Government order dated 20 July 1981 directed to be treated as Government employees with effect from 22nd October 1980. The Defence Department refused to treat the period of service prior to 22 October 1980 in such canteens as part of the qualifying service for the purpose of pension. It was held that the occupier of a factory is required to maintain a canteen. The Managing Committee of the canteen which is not an incorporated body cannot be considered to be the employer. In the case of a canteen run by the contractor or a co-operative society the position may be different. Therefore it cannot be said that the employees of the canteen would not be employees of the occupier even though for the purposes of management the Canteen Managing Committee whose functions are advisory is constituted under the Rules. There is nothing to show that on the workers in the canteen becoming Government employees with effect from 22 October, 1980 they were paid by the previous management, namely the Canteen Managing Committee. Further no compensation in lieu of services rendered by the employees prior to 22 October, 1980 was paid. Hence the employees of the canteen are employees of the factory and the service rendered by the employees prior to 22 October, 1980 should also be counted for

1. *Balkrishan* v. *K.J. Mishra*, AIR 1979 Bom 198.
2. (1989) 1 Lab LJ 26 (SC).

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the purposes of qualifying service for pension.

In *General Labour Union (Red Flag)* v. *K.M. Desai and others*,[1] the company appointed contractor to run, the canteen for the employees, though the company itself is registered under Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970, the contractor did not get the contract registered under Section 12 of the aforesaid Act. Hence the canteen workers claimed that they have become the direct employees of the company. It was held that unless the workmen employed in the canteen are doing the work in the same level as in the factory or the same kind of work as in the establishment, they cannot become the workmen or the employees of the company under Sections 46 and 103 of the Factories Act.

In *Workmen of Ashok Leyland Ltd. and Ashok Leyland Coop. Canteen Ltd.* v. *Ashok Leyland Ltd. & others*,[2] a canteen was run by co-operative society as required by Section 46 of the Factories Act. Later on the canteen became defunct and the employees of the canteen claimed to be treated as employees of the factory. It was held that it is true that the company is bound to provide and maintain a canteen under Section 46 of the Factories Act but when the canteen is run by a co-operative society as a separate entity and it becomes defunct, the occupier of the factory does not become the employer of the workmen employed in the canteen.

In *A.P. Dairy Development Co-op. Federation Ltd.* v. *Shivadas Pillay and others*,[3] the Federation was running a canteen for the workers employed in the factory and office establishment under the supervision of the welfare officer. The employees of the canteen wanted to be treated as regular employees of the federation in regular scales as they were being paid meagre salaries without attendant benefits. It was contended on behalf of the federation that the canteen was managed by an advisory committee known as the Managing Committee. It was held that once a canteen is established under Section 46 of the Factories Act, the employees of the canteen would become employees of the occupier and they will not cease to be so only because for the purposes of management a canteen managing committee whose functions are advisory has to be constituted under the Rules.

Section 47. Shelters, rest rooms and lunch rooms.—Section 47(1) lays down that in every factory wherein more than one hundred and fifty workers are ordinarily employed, adequate and suitable shelters or rest rooms and a suitable lunch room, with provision for drinking water, where workers can eat meals brought by them, shall be provided and maintained for the use of the workers. But any canteen maintained in accordance with the provisions of Section 46 shall be regarded as part of the requirements of this sub-section, and where a lunch room exists no worker shall eat any food in the work-room.

Section 47(2) requires that the shelters or rest rooms or lunch rooms to be provided under sub-section (1) shall be sufficiently lighted and ventilated and shall be maintained in a cool and clean condition.

Section 47(3) provides that the State Government may—

(a) prescribe the standards in respect of construction, accommodation, furniture and other equipment of shelters, rest rooms and lunch rooms to be provided under this section ;

(b) by notification in the Official Gazette, exempt any factory or class or description of factories from the requirements of this section.

Section 48. Creches.—The Royal Commission stressed upon the desirability of amenity of creches as follows :

1. (1990) 2 Lab LJ 259 (Bom).
2. (1991) 2 Lab LJ 12 (Madras).
3. (1992) 1 Lab LJ 153 (AP).

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"Creches are not uncommon in factories employing women. In many of the factories employing women in substantial number, no creches have been provided. As a result of their absence, infants are taken into the mills and found lying on sacking, in bobbin boxes and other unsuitable places, exposed to the noise and danger of moving machinery and a dust laden atmosphere".

Section 48(1) lays down that in every factory wherein more than thirty women workers are ordinarily employed there shall be provided and maintained a suitable room or rooms for the use of children under the age of six years of such women.

According to Section 48(2) such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants.

Section 48(3) empowers the State Government to make rules—

(a) prescribing the location, and the standards in respect of construction, accommodation, furniture and other equipment of rooms to be provided, under this section ;

(b) requiring the provision in factories, to which this section applies, of additional facilities for the care of children belonging to women workers including suitable provision of facilities for washing and changing their clothing ;

(c) requiring the provision in any factory of free milk or refreshment or both for such children ;

(d) requiring that facilities shall be given in any factory for the mother of such children to feed them at the necessary intervals.

Section 49. Welfare Officer.—Section 49(1) provides that in every factory wherein five hundred or more workers are ordinarily employed the occupier shall employ in the factory such number of welfare officers as may be prescribed. According to Section 49(2) the State Government may prescribe the duites, qualifications and conditions of services of officers employed under sub-section (1). It was held in *Employees' Association of Northern India* v. *Secretary of Labour*,[1] that the provision of this section shall apply to those sugar factories also wherein five hundred or more workers are employed for a few months in a year.

Under what circumstances and subject to what conditions, an employee's services can be terminated can well be the subject matter of a contract of employment, because conditions of service would take in the termination of service and incidentally, the conditions subject to which such termination could be brought about. That being so a rule imposing on the management obligation to secure the concurrence of the Labour Commissioner before inflicting the punishment, cannot be said to fall outside Section 49(2) of the Act.[2]

Section 50. Power to make rules to supplement this Chapter.—Section 50 of the Act empowers the State Government to make rules—

(a) exempting, subject to compliance with such alternative arrangement for the welfare of workers as may be prescribed, any factory or class or description of factories from compliance with any of the provisions of this Chapter ;

(b) requiring in any factory, or class or description of factories that representatives of the workers employed in the factory shall be associated with the management of the welfare arrangements of the workers.

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1. AIR 1952 All 109.
2. *A. Ganganamani* v. *P.N. Sharma*, AIR 1965 SC 1595.

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CHAPTER VI
WORKING HOURS OF ADULTS

Section 51. Weekly hours.—Section 51 lays down that no adult worker shall be required or allowed to work in a factory for more than forty-eight hours in any week. Section 51 does not prohibit requiring an employee working 42 hours a week to work 48 hours after a departmental transfer and he cannot claim overtime wages for those additional six hours.[1]

Section 52. Weekly holidays.—Section 52(1) provides that no adult worker shall be required or allowed to work in a factory on the first day of the week (hereinafter referred to as the said day), unless—

(a) he has or will have a holiday for a whole day on one of the three days immediately before or after the said day ; and

(b) the manager of the factory has, before the said day or the substituted day under clause (a), whichever is earlier—

(i) delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of the day which is to be substituted ; and

(ii) displayed a notice to that effect in the factory.

But no substitutions shall be made which will result in any worker working more than ten days consecutively without a holiday for a whole day.

Section 52(2) provides that notice given under sub-section (1) may be cancelled by a notice delivered at the office of the Inspector and a notice displayed in the factory not later than the day before the said day or holiday to be cancelled, whichever is earlier. Under Section 52(3) where, in accordance with the provisions of sub-section (1), any worker works on the said day and had a holiday on one of the three days immediately before it, that said day shall for the purpose of calculating his weekly hours of work be included in the preceding week.

What the provisions of clauses (a) and (b) of Section 52(1) permit is to grant exemptions to specified workmen from the operation of the prohibition enacted in Section 52 from working in factories on weekly holidays. No general permission can be granted under clauses (a) and (b) of sub-section (1) of Section 52 for altering the day of the weekly holiday so as to cover all the workmen. Therefore, upon the proper construction of the provisions it is clear that whenever workers are required or are permitted to work on a weekly holiday, the specific permission of the Chief Inspector of Factories in respect of each and every worker who is required to work on such a day should be obtained.[2]

Where something is done in breach of the prohibition enacted by sub-section (1) of Section 52 both the manager as well as occupier will be liable to the penalties prescribed in that behalf.[3]

It was held in *John* v. *State of West Bengal*,[4] that "the opening words of sub-section (1) of Section 52 indicate a prohibition from requiring or permitting an adult

1. *Imperial Tobacco Co.* v. *State*, AIR 1971 Cal 109.
2. *John* v. *State of West Bengal*, AIR 1965 SC 1341.
3. *John* v. *State of West Bengal*, AIR 1965 SC 1341.
4. AIR 1956 SC 1341.

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worker to work in a factory on the first day of week. The prohibition is, however, lifted if steps are taken under clauses (a) and (b) of that section. A perusal of clause (b) makes it abundantly clear that what is required to be done thereunder, that is to say, to give and display a notice is only for the pupose of securing an exemption from the prohibition contained in the opening parts of Section 52 of the Act. Clause (b) cannot therefore, be linked to some other provisions of the Act which impose a positive duty upon the manager to do something. The prohibition contained in the opening words of this sub-section is general and is not confined to the Manager.

Section 53. Compensatory holidays.—Section 53(1) lays down, that where as a result of the passing of an order or the making of a rule under the provisions of this Act exempting a factory or the workers therein from the provisions of Section 52, a worker is deprived of any of the weekly holidays for which provision is made in sub-section (1) of that section, he shall be allowed, within the month in which the holidays were due to him or within the two months immediately following that month, compensatory holidays of equal number to the holidays so lost.

Section 53(2) empowers the State Government to prescribe the manner in which the holidays for which provision is made in sub-section (1) shall be allowed.

Section 54. Daily hours.—According to Section 54 no adult worker shall be required or allowed to work in a factory for more than nine hours in any day. This rule is subject to the provisions of Section 51 of the Act. It is further provided that the daily maximum hours specified in this section may with the previous approval of the Chief Inspector be exceeded in order to facilitate the change of shifts.

Section 55. Intervals for rest.—According to Section 55(1) the periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed five hours and that no worker shall work for more than five hours before he has had an interval for rest of at least an hour.

Section 52(2) lays down that the State Government, or subject to the control of the State Government, the Chief Inspector may, by written order and for reasons specified therein, exempt any factory from the provisions of sub-section (1), so however, that the total number of hours worked by a worker without an interval does not exceed six.

Section 56. Spreadover.—According to Section 56 the period of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest under Section 55, they shall not spreadover more than ten and a half hours in any day. But the Chief Inspector may, for reasons to be specified in writing increase the spreadover upto twelve hours.

Section 57. Night Shifts.—According to Section 57 where a worker in a factory works on a shift which extends beyond mid-night,

(a) for the purposes of Sections 52 and 53, a holiday for whole day shall mean in his case a period of twenty-four consecutive hours beginning when his shift ends.

(b) the following day for him shall be deemed to be the period of twenty-four hours beginning when such shift ends, and the hours he has worked after midnight be counted in the previous day.

Section 58. Prohibition of overlapping shift.—Section 58(1) provides that work shall not be carried on in any factory by means of a system of shifts so arranged that more than one relay of workers is engaged in work for the same kind at the same time. According to Section 58(2) the State Government, or subject to the control of the State Government, the Chief Inspector may, by written order and for the reasons specified therein, exempt on such conditions as may be deemed expedient any factory

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or class or description of factories or any department or section of a factory or any category or description of workers therein from the provisions of sub-section (1).

Section 59. Extra wages for overtime.—(1) Under Section 59(1) where a worker works in factory for more than nine hours in any day or for more than forty-eight hours in a week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.

(2) For the purposes of sub-section (1), "ordinary rate of wages" means the basic wages plus such allowances, including the cash equivalent of the advantage accruing through the concessional-sale to workers of foodgrains and other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work.

(3) Where any workers in a factory are paid on a piece-rate basis, the time rate shall be deemed to be equivalent to the daily average of their fulltime earnings for the days on which they actually worked on the same or identical job during the month immediately preceding the calendar month during which the overtime work was done, and such time rates shall be deemed to be the ordinary rates of wages of those workers :

Provided that in the case of a worker who has not worked in the immediately preceding calendar month on the same or identical job, the time rate shall be deemed to be equivalent to the daily average of the earning of the worker for the days on which he actually worked in the week in which the overtime was done.

Explanation.—For the purpose of this sub-section in computing the earnings for the days on which the workers actually worked such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of foodgrains and other articles, as the worker is for the time being entitled to, shall be included but any bonus or wages for overtime work payable in relation to the period with reference to which the earnings are being computed shall be excluded.

Section 59(4) provides that the cash equivalent of the advantage accruing through the concessional sale to a worker of foodgrains and other articles shall be computed as often as may be prescribed on the basis of the maximum quantity of foodgrains and other articles admissible to a standard family.

Explanation 1.—"Standard family" means a family consisting of the worker, his or her spouse and two children below the age of fourteen years requiring in all three adult consumption units.

Explanation 2.—"Adult consumption unit" means the consumption unit of a male above the age of fourteen years ; and the consumption unit of a female above the age of fourteen years and that of a child below the age of fourteen years shall be calculated at the rates of 8 and 6 respectively of one adult consumption unit.

Section 59(5) empowers the State Government to make rules prescribing—

(a) the manner in which the cash equivalent of the advantage accruing through the concessional sale to a worker of foodgrains and other articles shall be computed ; and

(b) registers that shall be maintained in a factory for the purpose of securing compliance with the provisions of this section.

It has been held in *State of Gujarat* v. *Kansara Manilal*,[1] that "Section 59 cannot be considered in isolation ; it has to be read with Section 64, where the State Government has been given the power to make exempting rules. Under those rules a departure from the provisions of Sections 51, 52, 55 and 56 can be made but only in accordance with the rules so framed ; as for example, overtime work may be taken from workers engaged on urgent repairs inspite of the provisions of Section 51, 52, 55 and

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1. AIR 1964 SC 1893.

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56 but must be in accordance with Rule 91 and the urgency which is referred to in this section and the rule is an urgency relating to the factory and not an urgency felt by the constituents of the factory. A departure from the hours of work as laid down in Section 61(2) can only be made in those cases in which the exempting provisions of the rules cover the case and not otherwise.

It was held in *Union of India* v. *Suresh C. Baskey & others*,[1] that Section 59 of the Factories Act, 1948 defines "ordinary rate of wages" in order to calculate overtime allowance as basic wages plus allowances including the cash equivalent of foodgrains and other articles but not bonus and wages for overtime work. Workers who were not entitled to house rent allowance but who were occupying Government accommodation are not entitled to include house rent allowance notionally in the ordinary rate of wages for computing their extra wages for overtime.

In *M/s. New Victoria Mills Ltd.* v. *The Labour Court (1) Kanpur & others*,[2] some clerks of the Corporation were required to work 42 hours in a week. In the exigencies of service the corporation decided to increase the working hours from 7 to 7½ hours per day. These clerks claimed extra payment for overtime work of ½ hour per day done by them. It was held that in the absence of any statutory provisions or case law in support of the proposition that in respect of the extra half hour work which was taken from the workmen by the corporation, the concerned workmen were not entitled to proportionate extra wages and in the absence of any provision in the contract of employment to enable the corporation to extra work from the workmen without incurring the liability of making proportionate extra payment, the workmen are entitled to proportionate extra payment for the extra work taken fom them.

In the *Clothing Factory, National Workers Union, Avadi, Madras* v. *Union of India and others*,[3] the piece rated workers of the Ordinance Clothing Factory worked for 8 hours during the week except on Saturday, when they work for 4 ¾ hours. Thus they worked for 44¾ hours in a week. The workers claimed over time wages under Section 59 of the Act for the work done beyond 44 ¾ hours until 48 hours in a week. It was held that Section 59 of the Act in strict sense applies to cases of overtime work beyond 9 hours a day or 48 hours a week. The grant of overtime wages for the period in excess of the normal working hours of 44 ¾ per week and upto 48 hours is governed by the relevant Department Rules. Section 59 of the Factories Act comes into play only if the piece rated worker has worked beyond 9 hours in a day or 48 hours in a week and not otherwise.

Section 60. Restriction on double employment.—According to Section 60, no adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed.

Section 61. Notice of periods of work for adults.—According to Section 61(1), a notice of periods of work for adults, showing clearly every day the periods during which adult workers, may be required to work, shall be displayed and correctly maintained in the factory in accordance with the provisions of Section 108(2).

Section 61(2) lays down that the periods shown in the notice required by sub-section (1) shall be fixed before hand in accordance with the following provisions of the section, and shall be such that workers working for those periods would not be working in contravention of any of the provisions of Sections 51, 52, 54, 55, 56 and 58.

1. (1996) 1 LLJ 1094 (SC).
2. (1990) 2 Lab LJ 575 (All).
3. (1990) 2 Lab LJ 201 (SC).

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Under Section 61(3) where all the adult workers in a factory are required to work during the same periods the manager of the factory shall fix those periods for such workers generally.

According to Section 61(4) where all the adult workers in a factory are not required to work during the same period, the manager of the factory shall classify them into groups according to the nature of their work indicating the number of workers in each group.

Section 61(5) lays down that for each group which is not required to work on a system of shifts the manager of the factory shall fix the period during which the group may be required to work.

Section 61(6) says that where any group required to work on a system of shifts and the relays are not to be subject to pre-determined periodical changes of shifts, the manager of the factory shall fix the period during which each relay of the group may be required to work.

Section 61(7) provides that where any group is to work on a system of shifts, and the relays are to be subject to pre-determined periodical changes of shifts, the manager of the factory shall draw up a scheme of shifts whereunder the periods during which any relay of the group may be required to work and the relay which will be working at any time of the day shall be known for any day.

Section 61(8) empowers the State Government to prescribe forms of the notice required by sub-section (1) and the manner in which it shall be maintained.

Section 61(9) lays down that in the case of a factory beginning work after the commencement of this Act, a copy of the notice referred to in sub-section (1) shall be sent in duplicate to the Inspector before the day on which work is begun in the factory.

Section 61(10) lays down that any proposed change in the system of work in any factory which will necessitate a change in the notice referred to in sub-section (1) shall be notified to the Inspector in duplicate before the change is made, and except with the previous sanction of the Inspector no such change shall be made until one week has elapsed since the last change.

It was held in *Abhai* v. *Emperor*[1] that a notice, if correct, even though it fulfils the requirements of this section, would mean failure to display as required by this section. If a system of work has been notified under sub-section (1) of Section 61, then a departure on a single day from that system would not mean a change in the system of work in the factory because a change within the meaning of this section means either a permanent change or a change for a fairly long period of time in the hours of work or any other condition.[2] It is within the discretion of the manager to change the working hours, but no change can be made after the mill begins working for the period scheduled in advance because hours employed are enjoined to be fixed by this section and cannot be subject to sudden or causal alteration.[3]

It was held in *State of Gujarat* v. *Kansara Manilal Bhikhalal*[4] that "sub-section (10) of Section 61 speaks of "change in the system of work in any factory which will necessitate a change in the notice" and these words refer not to a departure from the notice but to a change in the system, a change which would require the notice to be recast. The notice shows the periods during which adult workers may be required to work and these words are descriptive of the scheme of the employment of labour in the factory but are not apt to contemplate the time of employment for each individual

1. ILR 1943 Nag 38.
2. *Ayyamiyan* v. *Madras*, 35 Bom. LR 1167.
3. *Ibid.*
4. AIR 1964 SC 1893.

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worker. That can only be found by referring to the register which goes with the notice..... Section 61(10) makes no mention of the change in the register but of the change in the notice thereby indicate that the change contemplated is an overall change affecting a whole group and not an individual worker. The latter part of the sub-section also points in the same direction because it implies that such changes should not be frequent and if the change is for the second time, it should not be made until one week has elapsed since the last change. This cannot possibly refer to a casual change in the hours of work of an individual worker".

Section 62. Register of adult workers.—Section 62(1) lays down that the manager of every factory shall maintain a register of adult workers to be available to the Inspector at all times during working hours, or when any work is being carried on in the factory showing—

(a) the name of each adult worker in the factory ;

(b) the nature of his work ;

(c) the group, if any, in which he is included ;

(d) where his group works on shifts, the relay to which he is allotted ;

(e) such other particular as may be prescribed.

But if the Inspector is of opinion that any muster roll or register maintained as part of the routine of a factory gives in respect of any or all the workers in the factory the particulars required under this section, he may by order in writing, direct that such muster roll register shall, to the corresponding extent be maintained in place of, and be treated as, the register of adult workers in that factory.

According to sub-section (1-A) no adult worker shall be required or allowed to work in any factory unless his name and other particulars have been entered in the register of adult workers.

Section 62(2) authorises the State Government to prescribe the form of the register of adult workers, the manner in which it shall be maintained and the period for which it shall be preserved.

In *State of Maharashtra* v. *Sampat Lal Mensukh Bothara*,[1] it was held that the obligation to maintain registers is imposed on the manager and not the occupier of the factory. An occupier thereofre cannot be held liable for the failure of the manager to comply with the requirements of Sections 62 and 83 of the Act. The occupier cannot be said to have a guilty mind when he is not charged with the duty of maintaining the registers.

Section 63. Hours of work to correspond with notice under Section 61 and register under Section 62.—Section 63 provides that no adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adult displayed in the factory and the entries made before hand against his names in the register of adult workers of the factory.

Section 64. Power to make exempting rules.—Section 64(1) empowers the State Government to make rules defining the persons who hold positions of supervision or management or are employed in a confidential position in a factory, or empowering the Chief Inspector to declare any person other than a person defined by such rules, as a person holding position of supervision or management or employed in a confidential position in a factory if in the opinion of the Chief Inspector, such person holds such position or is so employed. It is further provided that the provisions of this chapter other than the provisions of clause (b) of sub-section (1) of Section 66 and of the proviso to that sub-section shall not apply to any person so defined or declared :

Provided that any person so defined or declared shall, where the ordinary rate of

1. (1992) 1 Lab LJ 109 (Bom)

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wages of such person does not exceed the wage limit specified in sub-section (6) of Section 1 of the Payment of Wages Act, 1936 as amended from time to time, be entitled to extra wages in respect of overtime work under Section 59.

Section 64(2) authorises the State Government to make rules in respect of adult workers in factories providing for the exemption, to such extent and subject to such conditions, as may be prescribed—

(a) of workers engaged on urgent repairs from the provisions of Sections 51, 52, 54, 55 and 56 ;

(b) of workers engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of the factory from the provisions of Sections 51, 54, 55 and 56 ;

(c) of workers engaged in work which is necessarily so intermittent that the intervals during which they do not work while on duty ordinarily amount to more than the intervals for rest required by or under Section 55, from the provisions of Sections 51, 54, 55 and 56 ;

(d) of workers engaged in any work which for technical reasons must be carried on continuously from the provisions of Sections 51, 52, 54, 55 and 56 ;

(e) of workers engaged in making or supplying articles of prime necessity which must be made or supplied every day, from the provisions of Section 51 and Section 52 ;

(f) of workers engaged in manufacturing process which is carried on except during fixed seasons, from the provisions of Section 51, Section 52 and Section 54 ;

(g) of workers engaged in manufacturing process which cannot be carried on except at times dependent on the irregular action of natural forces, from the provisions of Sections 52 and 55 ;

(h) of workers engaged in engine rooms or boiler houses or in attending to power plant or transmission machinery from the provisions of Section 51 and Section 52 ;

(i) of workers engaged in the printing of newspapers, who are held up on account of the breakdown of machinery, from the provisions of Sections 51, 54 and 56.

Explanation.—In this clause the expression "newspapers" has the meaning assigned to it in the Press Registration of Books Act, 1867 ;

(j) of workers engaged in the loading or unloading railway wagons, or lorries, or trucks from the provisions of Sections 51, 52, 54, 55 and 56 ;

(k) of worker engaged in any work, which is notified by the State Government in the official Gazette as a work of national importance, from the provisions of Section 51, Section 52, Section 54, Section 55 and Section 56.

Provision in Section 64(2)(d) is a special provision and will over-ride both sub-section (1) and (2) of Section 55. Section 64(2)(d) gives power to the State Government by making rules to exempt certain types of factories from the application of the whole of Section 55, subject to such conditions and to such extent as the rules may provide.[1]

Section 64(3) lays down that the rules made under Section 64(2) providing for any exemption may also provide for any consequential exemption from the provisions of Section 61 which the State Government may deem to be expedient subject to such

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1. *Workmen* v. *Motipur Sugar Factory*, AIR 1965 SC 1803.

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conditions as it may prescribe.

Section 64(4) provides that in making rules under this section the State Government shall not exceed, except in respect of exemption under clause (a) of sub-section (2), the following limits of work inclusive of overtime ;

(i) the total number of hours of work in any day shall not exceed ten ;

(ii) the spreadover, inclusive of intervals for rest, shall not exceed twelve hours in any one day :

Provided that the State Government may, in respect of any or all of the categories of workers referred to in clause (d) of sub-section (2) make rules prescribing the circumstances in which and the conditions subject to which, the restrictions imposed by clause (i) and clause (ii) shall not apply in order to enable a shift worker to work the whole or part of a subsequent shift in the absence of a worker who has failed to report for duty ;

(iii) the total number of hours of work in a week, including overtime shall not exceed sixty ;

(iv) the total number of hours of overtime work shall not exceed fifty for any one quarter.

Explanation.—"Quarter" means a period of three consecutive months beginning on the 1st January, the 1st of April, the 1st of July or the 1st of October.

Section 64 (5) lays down that the rules made under this section shall remain in force for not more than five years.

It was held in *Emperor* v. *R.F. Mistry*,[1] that the exemption intended to be granted under this section must be specifically given ; it cannot be deduced or inferred from any exemption specifically enacted under the Act. But a contrary view has been expressed in *Superintendent and Remembrancer for Legal Affairs, Bengal* v. *J.J. Andrews*.[2]

Section 65. Power to make exempting order.—Section 65(1) lays down that where the State Government is satisfied that, owing to the nature of the work carried on or to other circumstances it is unreasonable to require that the period of work of any adult workers in any factory or class or description of factories should be fixed before-hand, it may by written order, relax or modify the provisions of Section 61 in respect of such workers therein, to such extent and in such manner as it may think fit, and subject to such conditions as it may deem exepedient to ensure control over period of work.

According to Section 65 (2), the State Government or subject to the control of the State Government, the Chief Inspector, may, by written order, exempt any or all of the adult workers in any factory or group or class or description of factories from any or all of the provisions of Sections 51, 52, 54 and 56. The said exemption shall be subject to such conditions as may be deemed expedient and shall be granted on the ground that it is required to enable the factory or factories to deal with an exceptional pressure of work.

Section 65 (3) lays down that any exemption granted under sub-section (2) shall be subject to the following conditions, namely :

(i) the total number of hours of work in any day shall not exceed twelve ;

(ii) the spread-over, inclusive of intervals for rest, shall not exceed thirteen hours in any one day ;

(iii) the total number of hours of work in any week, including overtime, shall not exceed sixty ;

1. AIR 1937 Bom. 520.
2. AIR 1931 Cal 639.

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(iv) no worker shall be allowed to work overtime, for more than seven days at a stretch and the total number of hours of overtime work in any quarter shall not exceed seventy-five.

Explanation.—In this sub-section "quarter" has the same meaning as in sub-section (4) of Section 64.

Section 66. Further restrictions on employment of women.—Section 66 (1) lays down that the provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions, namely :

(a) no exemption for the provisions of Section 54 may be granted in respect of any woman ;

(b) no woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m.

But the State Government may by notification in the official Gazette, in respect of any factory or group or class or description of factories vary the limit laid down in clause (b) in such a manner that in no case any such variation shall authorise the employment of any woman between the hours of 10 p.m. and 5 a.m. ;

(c) there shall be no change of shifts except after a weekly holiday or any other holiday.

Section 66 (2) empowers the State Government to make rules providing for the exemption from the restrictions set out in sub-section (1) to such extent and subject to such conditions as it may prescribe, of women working in fishcuring or fish-canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to, or deterioration in, any raw material. Section 66 (3) provides that the rules made under sub-section (2) shall remain in force for not more than three years at a time.

The Royal Commission on Labour in its report has pointed out that "the main arguments in favour of fixing the maximum for women's hours at lower levels than those prescribed for men are that women have domestic duties to perform and that they find long hours as a greater strain".

Where women workers in a textile factory voluntarily ousted and otherwise regulated their spinning loom for their own satisfaction and comfort about twenty minutes before the statutory hour for beginning work, it was held that the women had not been employed before the statutory hour.[1] The Inspector has no right to issue a general prohibition against employment of woman at night without going into the question whether the staff is sufficient.[2]

In *Omana Oomen and others* v. *F.A.C.T. Ltd.*[3] the women candidates were excluded for the internal examination leading to absorption on a regular basis for the only reason that they were women. Under Section 66 (b) the State Government is authorised to relax the provisions and allow the women to work between 5 a.m. to 10 p.m. It was held that women candidates could be accommodated to work in shifts between 5 a.m. to 10 p.m. but the company did not move the State Government to obtain such permission. Therefore the exclusion of women candidates on the ground of sex was violative of Articles 14 and 15 of the Constitution. If other women trainees were regularly absorbed in employment which involves working in shifts, there is no reason to eliminate the petitioners.

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1. *Peterson* v. *Duke*, (1904) 6 F 53.
2. *J.N. Cocalas* v. *Emperor*, AIR 1921 All 229.
3. (1991) 2 Lab LJ 541 (Kerala).

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CHAPTER VII
EMPLOYMENT OF YOUNG PERSONS

Section 67. Prohibition of employment of young children.—Section 67 provides that no child who has not completed his fourteenth year shall be required or allowed to work in any factory.

Section 68. Non-adult workers to carry tokens.—Section 68 lays down that a child who has completed his fourteenth year or an adolescent shall not be required or allowed to work in any factory unless,—

(a) a certificate of fitness granted with reference to him under Section 69 is in the custody of the manager of the factory ; and

(b) such child or adolescent carries while he is at work a token giving a reference to such certificate.

Section 69. Certificate of fitness.—According to Section 69 a certifying surgeon shall, on the application of any young person or his parent or guardian accompanied by a document signed by the manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which a young person wishes to work, examine such person and ascertain his fitness for work in a factory.

Section 69(2) lays down that the certifying surgeon, after examination, may grant to such young person, in the prescribed form, or may renew—

(a) a certificate of fitness to work in a factory as a child, if he is satisfied that the young person has completed his fourteenth year, that he has attained the prescribed physical standards and that he is fit for such work ;

(b) a certificate of fitness to work in a factory as an adult, if he is satisfied that the young person has completed his fifteenth year, and is fit for a full day's work in a factory.

But unless the certifying surgeon has personal knowledge of the place where the young person proposes to work and the manufacturing process in which he will be employed, he will not grant or renew a certificate under this sub-section until he has examined such place.

Section 69(3) lays down that a certificate of fitness granted or renewed under sub-section (2)—

(a) shall be valid only for a period of twelve months from the date thereof ;

(b) may be made subject to conditions in regard to the nature of the work in which the young person may be employed or requiring re-examination of the young person before the expiry of the period of twelve months.

According to Section 69 (4) a certifying surgeon shall revoke any certificate granted or renewed under sub-section (2) if in his opinion the holder of it is no longer fit to work in the capacity stated therein in a factory.

Section 69(5) lays down that where a certifying surgeon refuses to grant or renew a certificate or a certificate of the kind requested or revokes a certificate he shall, if so requested by any person who could have applied for the certificate or the renewal thereof, state his reasons in writing for so doing.

Section 69(6) provides that where certificate under this section with reference to

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any young person is granted or renewed subject to such conditions as are referred to in clause (b) of sub-section (3), the young person shall not be required or allowed to work in any factory except in accordance with those conditions.

According to Section 69(7) any fee payable for certificate under this section shall be paid by the occupier and shall not be recoverable from the young person, his parents or guardian.

Section 70. Effect of certificate of fitness granted to adolescent.—Section 70(1) lays down that an adolescent who has been granted a certificate of fitness at work in a factory as an adult under clause (b) of sub-section (2) of Section 69 and who while at work in a factory carries a token giving reference to the certificate shall be deemed to be an adult for all the purposes of Chapters VI and VIII.

According to Section 70 (1-A) no female adolescent or a male adolescent who has not attained the age of seventeen years but who has been granted a certificate of fitness to work in a factory as an adult, shall be required or allowed to work in any factory except between 6 a.m. and 7 p.m. :

Provided that the State Government may by notification in the official Gazette, in respect of any factory or group or class or description of factories,—

(i) vary the limits laid down in this sub-section so however, that no such section shall authorise the employment of any female adolescent between 10 p.m. and 5 a.m. ;

(ii) grant exemption from the provisions of this sub-section in case of serious emergency where national interest is involved.

According to Section 70(2) and adolescent who has not been granted a certificate of fitness to work in a factory as an adult under the aforesaid clause (b) shall, notwithstanding his age, be deemed to be a child for the purposes of this Act.

Section 71. Working hours for children.—Section 71(1) prohibits a child from being employed or permitted to work in any factory—

(a) for more than four and a half hours in any day ;

(b) during the night.

Explanation.—For the purposes of this sub-section "night" shall mean a period of at least twelve consecutive hours which shall include the interval between 10 p.m. and 6 a.m.

Section 71(2) lays down that the period of work of all children employed in a factory shall be limited to two shifts which shall not overlap or spreadover more than five hours each and each child shall be employed in only one of the days which shall not, except with the previous permission in writing of the Chief Inspector, be changed more frequently than once in a period of thirty days.

Section 71(3) provides that the provisions of Section 52 shall apply also to child workers, and no exemption from the provisions of that section may be granted in respect of any child.

No child, under Section 71(4), shall be required or allowed to work in any factory on any day on which he has already been working in another factory.

(5) No female child shall be required or allowed to work in any factory except between 8 a.m. and 7 p.m.

Section 72. Notice of periods of work for children.—Section 72(1) provides that there shall be displayed and correctly maintained in every factory in which children are employed, in accordance with the provisions of sub-section (2) of Section 108 a notice of periods of work for children, showing clearly for every day the periods during which children may be required or allowed to work.

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According to Section 72(2), the periods shown in the notice required by sub-section (1) shall be fixed before-hand in accordance with the method laid down for adult workers in Section 61 and shall be such that children working for those periods would not be working in contravention of any of the provisions of Section 71.

The provisions of sub-sections (8), (9) and (10) of Section 61 shall, in view of Section 72(3), apply also to the notice required by sub-section (1) of this section.

Section 73. Register of child workers.—According to Section 73(1), the manager of every factory in which children are employed shall maintain a register of child workers to be available to the Inspector at all times during working hours or when any work is being carried on in a factory, showing—

(a) the name of each child worker in the factory ;

(b) the nature of his work ;

(c) the group, if any, in which he is included ;

(d) where his group works on shifts, the relay to which he is allotted ; and

(e) the number of his certificate of fitness granted under Section 69.

No child worker shall be required or allowed to work in any factory unless his name and other particulars have been entered in the register of child workers.

Section 73(2) authorises the State Government to prescribe the form of the register of child workers, the manner in which it shall be maintained and the period for which it shall be preserved.

Section 74. Hours of work to correspond with notice under Section 72 and register under Section 73.—Under Section 74 a child shall not be employed in any factory otherwise than in accordance with the notice of periods of work for children displayed in the factory and the entries made before-hand against his name in the register of child workers of the factory.

Section 75. Power to require medical examination.—Under Section 75 an Inspector may serve on the manager of the factory a notice requiring that—

(i) such person or young person, as the case may be, shall be examined by a certifying surgeon ; and

(ii) such person or young person shall not, if the Inspector so directs, be employed, or permitted to work, in any factory until he has been so examined and has been granted a certificate of fitness or a fresh certificate of fitness, as the case may be, under Section 69 or has been certified by the certifying surgeon examining him not to be a young person.

The Inspector may as aforesaid serve the notice if he is of opinion—

(a) that any person working in a factory without a certificate of fitness is a young person ; or

(b) that any young person working in a factory with a certificate of fitness is no longer fit to work in the capacity stated therein.

Section 76. Power to make rule.—Section 76 empowers the State Government to make rules—

(a) prescribing the forms of certificates of fitness to be granted under Section 69, providing for the grant of duplicates in the event of loss of the original certificates, and fixing the fees which may be charged for such certificates and renewals thereof and such duplicates ;

(b) prescribing the physical standards to be attained by children and adolescents working in factories ;

(c) relating to the procedure of certifying surgeons under this Chapter ;

(d) specifying other duties which a certifying surgeon may be required to

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perform in connection with the employment of young persons in factories and fixing the fees which may be charged for such duties and the persons by whom they shall be payable.

Section 77. Certain other provisions of law not barred.—Section 77 provides that the provisions of this Chapter shall be in addition to and not in derogation of, the provisions of the Employment of Children Act, 1938.

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CHAPTER VIII
ANNUAL LEAVE WITH WAGES

Section 78. Application of Chapter.—According to Section 78, the provisions of this Chapter shall not operate to the prejudice of any right to which a worker may be entitled under any other law or under the terms of any award, agreement (including settlement), or contract of service. Provided that if such award, agreement (including settlement), or contract of service provides for a longer annual leave with wages than provided in this Chapter, the quantum of leave, which the worker shall be entitled to, shall be in accordance with such award, agreement or contract of service, but in relation to matters not provided for in such award, agreement or contract of service or matters which are provided for less favourably therein, the provisions of Sections 79 to 82, so far as may be, shall apply.

Section 78(2) lays down that the provisions of this Chapter shall not apply to workers in any factory of any railway administered by the Government, who are governed by leave rules approved by the Central Government.

Section 79. Annual leave with wages.—Unless Section 79(1), every worker who has worked for a period of 240 days or more in a factory during a calendar year, shall be allowed during the subsequent calendar year, leave with wages for number of days calculated at the rate of—

(i) if an adult, one day for every twenty days of work performed by him during the previous calendar year ;

(ii) if a child, one day for every fifteen days of work performed by him during the previous calendar year.

Explanation 1.—For the purpose of this sub-section—

(a) any days of lay-off by agreement or contract or as permissible under the standing orders ;

(b) in the case of female worker, maternity leave for any number of days not exceeding twelve weeks ; and

(c) the leave earned in the year prior to that in which the leave is enjoyed, shall be deemed to be days on which the worker has worked, in a factory for the purpose of computation of the period of 240 days or more, but he shall not earn leave for these days.

Explanation 2.—The leave admissible under this sub-section shall be exclusive of all holidays whether occuring during or at either end of the period of leave.

Section 79(2) lays down that a worker whose service commences otherwise than on the first day of January shall be entitled to leave with wages at the rate laid down in clause (i), or as the case may be, clause (ii) of sub-section (1) if he has worked for two-thirds of the total number of days in the remainder of the calendar year.

According to sub-section (3) if a worker is discharged or dismissed from service or quits his employment or is superannuated or dies while in service, during the course of the calendar year, he or his heir or nominee, as the case may be, shall be entitled to wages in lieu of the quantum of leave to which he was entitled immediately before his discharge, dismissal, quitting of employment, superannuation or death calculated at the rates specified in sub-section (1), even if he had not worked for the entire period specified in sub-section (2) or sub-section (3) making him eligible to avail of such leave

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and such payment shall be made :

(i) where the worker is discharged or dismissed or quits employment before the expiry of the second working day from the date of discharge, dismissal or quitting ; and

(ii) where the worker is superannuated or dies while in service, before the expiry of two months from the date of such superannuation or death.

Section 79(4) says that in calculating leave under this section, fraction of leave of half a day or more shall be treated as one full day's leave, and fraction of less than half a day shall be omitted.

Section 79(5) provides that if a worker does not in any one calendar year take the whole of the leave allowed to him under sub-section (1) or sub-section (2) as the case may be, any leave not taken by him shall be added to the leave allowed to him in the succeeding calendar year. But the total number of days of leave that may be carried forward to a succeeding year shall not exceed thirty in the case of an adult or forty in case of a child. It is further provided in the second proviso that a worker who has applied for leave with wages but have not been given such leave in accordance with any scheme laid down in sub-section (8) and (9) or in contravention of sub-section (10) shall be entitled to carry forward the leave refused without any limit.

Under Section 79(6) a worker may at any time apply in writing to the manager of a factory not less than fifteen days before the date on which he wishes his leave to begin, to take all the leave or any portion thereof allowable to him during the calendar year. But the application shall be made not less than thirty days before the date on which the worker wishes his leave to begin, if, he is employed in a public utility service as defined in clause (n) of Section 2 of the Industrial Disputes Act, 1947. It is further provided that the number of times in which leave may be taken during any year shall not exceed three.

Section 79(7) lays down that if a worker wants to avail himself of the leave with wages due to him to cover a period of illness he shall be granted such leave even if the application for leave is not made within the time specified in sub-section (6) and in such a case wages as admissible under Section 81 shall be paid not later than fifteen days, or in the case of a public utility service, not later than thirty days from the date of the application for leave.

Section 79(8) lays down that for the purpose of ensuring the continuity of work the occupier or manager of the factory, in agreement with the Works Committee of the factory constituted under Section 3 of the Industrial Disputes Act, 1947, or a similar committee constituted under any other Act or if there is no such works committees or a similar committee in any factory, in agreement with the representative of the workers therein chosen in the prescribed manner, may lodge with the Chief Inspector a scheme in writing whereby the grant of leave allowance under this section may be regulated.

According to Section 79(9) a scheme lodged under sub-section (8) shall be displayed at some conspicuous and convenient places in the factory and shall be in force, for a period of twelve months from the date on which it comes into force, and may thereafter be renewed with or without modification for a further period of twelve months at a time, by the manager in agreement with the works committee or a similar committee, or as the case may be, in agreement with the representative of the workers as specified in sub-section (8), and a notice of renewal shall be sent to the Chief Inspector before it is renewed.

Under Section 79(10) an application for leave which does not contravene the provisions of sub-section (6) shall not be refused unless refusal is in accordance with the scheme for the time being in operation under sub-sections (8) and (9).

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According to Section 79(11) if the employment of a worker who is entitled to leave under sub-section (1) or sub-section (2), as the case may be, is terminated, by the occupier before he has taken the entire leave to which he is entitled, or if having applied for and having not been granted such leave, the worker quits his employment before he has taken the leave, the occupier of the factory shall pay him the amount payable under Section 80 in respect of the leave not taken, and such payment shall be made, where the employment of the worker is terminated by the occupier, before the expiry of the second working day after such termination, and where a worker who quits his employment on or before the next pay day.

According to Section 79(12) the unavailed leave of a worker shall not be taken into consideration in computing the period of any notice required to be given before dismissal.

Section 79(1) does not purport to standardise annual leave with wages. When Section 79(1) provides that every worker shall be allowed leave as prescribed, the provision *prima facie* sounds like a provision for the minimum rather than for the maximum leave which may be awarded to the worker.[1] Standardisation of conditions of service in industrial adjudication generally does not recognise or permit exceptions, Section 78, however, recognises exceptions to the leave prescribed by Section 79(1). Section 78(1) clearly negatives the theory that Section 79(1) provides for standardisation of annual leave with wages.[2] The provisions of Section 84 would also lead to the same result. If a factory provides better leave amenities to its employees, the State Government may in the interest of the employees exempt the factory from the operation of Chapter VIII of the Act. The scope of Section 84, like the scope of Section 78, cannot be limited only to the more favourable benefits existing at the date when the Act was passed. What is true about the existing benefits would be equally true about the benefits which may be granted by an employer to the employees in future.[3] In view of the above provisions an award of Industrial Tribunal purporting to make provision for privilege leave in excess of the annual leave sanctioned by Section 79(1) in the case of workers governed by the provisions of the Factories Act, 1948 is not without jurisdiction.

It was held in *Shankar Balaji* v. *State of Maharashtra*,[4] that the expression 'total full time earnings' can only mean the earnings of worker earns in a day by working full time on that day, the full time to be in accordance with the period of time given in the notice displayed in the factory for a particular day. This is further apparent from the fact that any payment for overtime or bonus is not included in computing the total full time earnings. It was further held that in the case of workers who can come at any time they like and go at any time they like and turn out as much work as they like, such as bidi rollers in certain bidi factories, there can be no basis for calculating the daily average of the workers' total full time earning and therefore the wages to be paid for the leave period cannot be calculated nor the number of days for which leave with wages can be allowed to be calculated in such a case. The provisions of Sections 79 and 80 about leave and leave wages, therefore, do not apply in the case of such workers.[5]

The right to leave with wages arises in favour of a worker or deemed worker under Section 79 only if he worked during the full period of factory employment for the prescribed number of days in the previous year because by the use of the expression 'days' in Section 79 working for the full period of work displayed in the factory under the appropriate section of the Factories Act is contemplated. Work for a period less than

1. *Alembic Chemical Works* v. *Workmen*, AIR 1961 SC 647.
2. *Ibid.*
3. *Ibid.*
4. AIR 1962 SC 517.
5. *Shankar Balaji* v. *State of Maharashtra*, AIR 1962 SC 517.

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the period displayed will not, in computing the number of days, be taken into account as a day within the meaning of Section 79.[1]

In *Suhrid Geigy Limited* v. *State of Gujarat*,[2] the question for consideration by the Court related to the scope of encashment of earned leave under Section 79(11) after the Amendment Act of 1976. It was held that after this amendment the scope of this section has become much wider because the benefit is available to much wider category of persons namely, discharge or dismissal from service, quitting of employment, superannuation or death while in service. The concept of 'current years' period being also counted for leave in wages under sub-section (3) now extends to employee quitting the service, being superannuated or dying while in service. Thus all workers who quit their employment would be entitled not only to accumulated leave from previous calendar years but also to leave attributable to the period of work during the calendar year in which they quit their employment.

Section 80. Wages during leave period.—Section 80(1) lays down that for the leave allowed to him under Section 78 or Section 79, as the case may be, a worker shall be entitled to wages at a rate equal to the daily average of his total full time earning for the days on which he actually worked during the month immediately preceding his leave, exclusive of any over-time and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the worker of the foodgrains and other articles :

Provided that in the case of a worker who has not worked on any day during the calendar month immediately preceding his leave, he shall be paid at a rate equal to the daily average of his total full time earnings for the days on which he actually worked during the last calendar month preceding his leave, in which he actually worked, exclusive of any overtime and bonus but inclusive of dearness allowance and the cash equivalent of the advantage accruing through the concessional sale to the workers of foodgrains and other articles.

Section 80(2) provides that the cash equivalent of the advantage accruing through the concessional sale to the worker of foodgrains and other articles shall be computed as often as may be prescribed on the basis of the maximum quantity of foodgrains and other articles admissible to a standard family.

Explanation 1.—"Standard family" means a family consisting of a worker, his or her spouse and two children below the age of fourteen years requiring in all three adult consumption units.

Explanation 2.—"Adult consumption unit" means the consumption unit of a male above the age of fourteen days ; and the consumption unit of a female above the age of fourteen years, and that of a child below the age of fourteen years shall be calculated at the rate of 8 and 6 respectively of one adult consumption unit.

Section 80(3) empowers the State Government to make rules prescribing—

(a) the manner in which the cash equivalent of the advantage accruing through the concessional sale to a worker of foodgrains and other articles shall be computed ; and

(b) the registers that shall be maintained in a factory for the purpose of securing compliance with the provisions of this section.

Section 81. Payment in advance in certain cases.—Section 81 provides that a worker who has been allowed leave for not less than four days, in the case of an adult and five days in the case of a child, before the leave begins, be paid the wages due for the period of the leave allowed.

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1. *B.Y. Kshatriya (P) Ltd.* v. *Union of India*, AIR 1963 SC 1591.
2. (1979) 1 LLJ 317 (Gujarat).

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Section 82. Mode of recovery of unpaid wages.—Under Section 82 any sum required to be paid by an employer, under this Chapter but not paid by him shall be recoverable as delayed wages under the provisions of the Payment of Wages Act, 1936.

Section 83. Power to make rules.—Under Section 83, the State Government may make rules directing managers of factories to keep registers containing such particulars as may be prescribed and requiring the registers to be made available for examination by Inspectors.

Section 84. Power to exempt factories.—Section 84 enacts that where the State Government is satisfied that the leave rules applicable to workers in a factory provide benefits which in its opinion are not less favourable than those for which this Chapter makes, provisions, it may, by written order exempt the factory from all or any of the provisions of this Chapter subject to such conditions as may be specified in the order.

Explanation.—For the purposes of this section, in deciding whether the benefits which are provided for by any leave rules are less favourable than those for which this chapter makes provision, or not, the totality of the benefits shall be taken into account.

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CHAPTER IX
SPECIAL PROVISIONS

Section 85. Power to apply the Act to certain premises.—The State Government is empowered under Section 85(1) to declare, by notification in the official Gazette, that all or any of the provisions of this Act shall apply to any place wherein a manufacturing process is carried on without the aid of power or is so ordinarily carried on notwithstanding that—

(i) the number of persons employed therein is less than ten if working with the aid of power and less than twenty if working without the aid of power ; or

(ii) the persons working therein are not employed by the owner thereof but are working with the permission of or under agreement with such owner, provided that the manufacturing process is not being carried on by the owner only with the aid of his family.

Section 85(2) says that after a place is so declared it shall be deemed to be a factory for the purposes of this Act and the owner shall be deemed to be the occupier and any person working therein, a worker.

Explanation.—For the purposes of this section "owner" shall include a lessee or mortgagee with possession of the premises.

Section 85 which authorises the State Government to issue a notification applying all or any of the provisions of the Act of any place in which a manufacturing process is carried on, and which involves the consequence that the place is deemed a factory and the persons working therein are deemed workers is not by itself discriminatory so as to infringe Article 14 of the Constitution ; nor does the provision amount to authorising imposition of unreasonable restriction upon the fundamental right of the owner of the factory to carry on his business.[1]

Section 85 permits selective application of the beneficient provisions of the Act to workers not covered thereby. The power is conferred to carry out effectively the purposes of the Act and to an authority which has the means at its command for making the requisite enquiries for ascertaining whether extension of the benefit is, in the interest of the workers and the public generally, demanded. Such a provision cannot be regarded as discriminatory.[2]

Section 79 clearly applies to workers who work for the full period of employment during factory hours and for the prescribed number of days and it may appear at first sight somewhat inappropriate that the benefit of annual leave with wages should be extended by notification under Section 85(1) to persons who do not work for the hours fixed for the establishment. But it is clear that Section 79, if it is made applicable by notification under Section 85, would apply to those workers only who work in the factory for the full period prescribed under Section 61, 71 and 66(1) of the Factories Act by the employer for not less than the number of qualifying days.[3] A "deemed worker" who is paid only for work done by him and who is under no obligation to attend at any fixed time may be entitled to benefit of annual leave with wages only if he fulfils the working conditions applicable to 'workers' as defined in sub-section (2) of

1. *B.Y. Kshatriya (P) Ltd.* v. *Union of India*, AIR 1963 SC 1591.
2. *Ibid.*
3. *Ibid.*

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the Act. The privilege of working for a period less than the period prescribed for regular workers in a factory will not, if he works for less than the prescribed hours come to the aid of a deemed worker so as to enable him to claim the benefits of Section 79 ; but that privilege will not deprive him, if he fulfils the conditions relating to duration of work, of the benefit of Section 79.[1]

Section 86. Power to exempt public institutions.—The State Government is under Section 86 empowered to exempt, subject to such conditions as it may consider necessary, any workshop or workplace where a manufacturing process is carried on and which is attached to a public institution maintained for the purposes of education, training, research, or reformation, from all or any of the provisions of the Act. But no exemption shall be granted from the provisions relating to hours of work and holidays, unless the persons having the control of the institution submit, for the approval of the State Government a scheme for the regulation of the hours of employment, intervals for meals, and holidays of the persons employed in or attending the institution or who are inmates of the institution, and the State Government is satisfied that the provisions of the scheme are not less favourable than the corresponding provisions of this Act.

Section 87. Dangerous operations.—According to Section 87, where the State Government is of opinion that any operation carried on in a factory exposes any person employed in it to a serious risk of bodily injury, poisoning or disease, it may make rules applicable to any factory or class or description of factories in which the manufacturing process or operation is carried on—

(a) specifying the manufacturing process or operation and declaring it to be dangerous ;

(b) prohibiting or restricting the employment of women, adolescents or children in the operation ;

(c) providing for the periodical medical examination of persons employed, or seeking to be employed, in the manufacturing process or operation and prohibiting the employment of persons not specified as fit in such employment and requiring the payment by the occupier of the factory of fees for such medical examination ;

(d) providing for the protection of all persons employed in the manufacturing process or operation or in the vicinity of the places where it is carried on ;

(e) prohibiting, restricting or controlling the use of any specified materials or processes in connection with the manufacturing process or operation ;

(f) requiring the provision of additional welfare amenities and sanitary facilities and the supply of protective equipment and clothing and laying down the standards thereof having regard to the dangerous nature of manufacturing process or operation.

Section 87-A. Power to prohibit employment on account of serious hazard.—(1) Where it appears to the Inspector that conditions in a factory or part thereof are such that they may cause serious hazard by way of the injury or death to the persons employed therein or to the general public in the vicinity, he may, by order in writing to the occupier of the factory, state the particulars in respect of which he considers the factory or part thereof to be the cause of such serious hazard and prohibit such occupier from employing any person in the factory or any part thereof other than the minimum number of persons necessary to attend to the minimum tasks till the hazard is removed.

(2) Any order issued by the Inspector under sub-section (1) shall have effect for a period of three days until extended by the Chief Inspector by a subsequent order.

1. *B.Y. Kshatriya (P) Ltd. v. Union of India*, AIR 1963 SC 1591.

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* Noise (Schedule 24)

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(3) Any person aggrieved by an order of the Inspector under sub-section (1), and the Chief Inspector under sub-section (2), shall have the right to appeal to the High Court.

(4) Any person whose employment has been affected by an order issued under sub-section (1), shall be entitled to wages and other benefits and it shall be the duty of the occupier to provide alternative employment to him wherever possible and in the manner prescribed.

(5) The provisions of sub-section (4) shall be without prejudice to the rights of the parties under the Industrial Disputes Act, 1947.

Section 88. Notice of certain accidents.—(1) Where in any factory an accident occurs which causes death or which causes any bodily injury by reason of which the person injured is prevented from working for a period of forty-eight hours or more immediately following the accident, or which is of such a nature as may be prescribed in this behalf, the manager of the factory shall send notice thereof to such authorities, and in such form and within such time, as may be prescribed.

(2) Where a notice given under sub-section (1) relates to an accident causing death, the authority to whom the notice is sent shall make an inquiry into the occurrence within one month of the receipt of the notice or, if such authority is not the Inspector, cause the Inspector to make an inquiry within the said period.

(3) The State Government may make rules for regulating the procedure at inquiries under this section.

Section 88-A. Notice of certain dangerous occurrences.—Where in a factory any dangerous occurrence of such nature as may be prescribed occurs, whether causing any bodily injury or disability or not, the manager of the factory shall send a notice thereof to such authorities, and in such form and within such time, as may be prescribed.

Section 89. Notice of certain diseases.—According to Section 89(1) where any worker in a factory contracts any disease specified in the third schedule, the manager of the factory shall send notice thereof to such authorities, and in such form and within such time, as may be prescribed.

Under Section 89(2) if any medical practitioner attends on a person who is or has been employed in a factory and who is, or believed by the medical practitioner to be, suffering from any disease specified in the third schedule, the medical practitioner shall without delay send a report in writing to the office of the Chief Inspector stating—

(a) the name and full postal address of the patient ;

(b) the disease from which he believes the patient to be suffering ;

(c) the name and address of the factory in which the patient is or was last employed.

Under Section 89(3) where the report under sub-section (2) is confined to the satisfaction of the Chief Inspector by the certificate of a certifying surgeon or otherwise, that the person is suffering from a disease specified in the third schedule, he shall pay to the medical practitioner such fee as may be prescribed and the fee so paid shall be recoverable as an arrears of land revenue from the occupier of the factory in which the person contracted the disease.

Under Section 89(4) if any medical practitioner fails to comply with the provisions of sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

According to sub-section (5) the Central Government may, by notification in the Official Gazette, add to or alter the third schedule and any such addition or alteration shall have effect as if it had been made by this Act.

Section 90. Powers to direct enquiry into cases of accident or

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disease.—According to Section 90(1) the State Government may, if it considers it expedient so to do appoint a competent person to inquire into the causes of any accident occurring in a factory or into any case where a disease specified in the third schedule has been, or is suspended to have been contacted in a factory, and may also appoint one or more persons possessing legal or special knowledge to act as assessors in such inquiry.

Section 90(2) lays down that the person appointed to hold an inquiry under this section shall have the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purposes of enforcing the attendance of witnesses and compelling the production of documents and material objects, and may also, so far as may be necessary for the purposes of the inquiry, exercise any of the power of an Inspector under this Act ; and every person required by the person making the enquiry to furnish any information shall be deemed to be legally bound so to do within the meaning of Section 176 of the Indian Penal Code.

Under Section 90(3) the person holding an inquiry under this section shall make a report to the State Government stating the cause of the accident, or as the case may be, disease and any attendant circumstances, and adding any observations which he or any of the assessors may think fit to make.

Section 90(4) lays down that the State Government may, if it thinks fit, cause to be published any report made under this section or any extracts therefrom.

Section 90(5) authorises the State Government to make rules for regulating the procedure at inquiries under this section.

Section 91. Power to take samples.—Section 91(1) empowers an Inspector to take, at any time during the normal working hours of a factory, after informing the occupier or manager of the factory or other person for the time being purporting to be Incharge of the factory in the manner hereinafter provided a sufficient sample of any substance used or intended to be used in the factory, such use being—

(a) in the belief of the Inspector in contravention of any of the provision of the Act or the rules made thereunder ; or

(b) in the opinion of the Inspector likely to cause bodily injury to, or injury to the health of, workers in the factory.

Under Section 91(2) where the Inspector takes a sample under sub-section (1), he shall, in the presence of the person informed under that sub-section unless such person wilfully absents himself, divide the sample into three portions and effectively seal and suitably mark them, and shall permit such person to add his own seal and mark thereto.

Section 91(3) lays down that the persons informed as aforesaid shall, if the Inspector so requires, provide the appliances for dividing, sealing, and making the sample taken under this section.

Under Section 91(4) the Inspector shall—

(a) forthwith give one portion of the sample to the person informed under sub-section (1) ;

(b) forthwith send the second portion to a Government Analyst for analysis and report thereon ;

(c) retain the third portion for production to the court before which proceedings, if any, are instituted in respect of the substance.

Section 91(5) provides that any document purporting to be a report under the hand of any Government Analyst upon any substance submitted to him for analysis and report under this section, may be used as evidence in any proceedings instituted in respect of the substance.

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Section 91-A. Safety and occupational health surveys.—(1) The Chief

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Inspector, or the Director General of Factory Advice Service and Labour Institutes, or the Director General of Health Services to the Government of India, or such other officer as may be authorised in this behalf by the State Government or the Chief Inspector or the Director General of Factory Advice Service and Labour Institutes or the Director General of Health Services may, at any time during the normal working hours of a factory, or at any time as is found by him to be necessary, after giving notice in writing to the occupier or manager of the factory, or any other person who for the time being purports to be in charge of the factory, undertake safety and occupational health surveys and such occupier or manager or other person shall afford all facilities for such survey, including facilities for the examination and testing of plant and machinery and collection of samples and other data relevant to the survey.

(2) For the purpose of facilitating surveys under sub-section (1) every worker shall, if so required by the person conducting the survey, present himself to undergo such medical examination as may be considered necessary by such person and furnish all information in his possession and relevant to the survey.

(3) Any time spent by a worker for undergoing medical examination or furnishing information under sub-section (2) shall, for the purpose of calculating wages and extra wages for overtime work, be deemed to be time during which such worker worked in the factory.

Explanation.—For the purposes of this section, the report, if any, submitted to the State Government by the person conducting the survey under sub-section (1) shall be deemed to be a report submitted by an Inspector under this Act.

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CHAPTER X
PENALTIES AND PROCEDURE

Section 92. General penalty for offences.—Section 92 of the Act makes any contravention of the following to be an offence—

(i) the provisions of the Act ; or

(ii) any rules made under the Act ; or

(iii) any order given in writing under the Act.

Under this section both the manager and the occupier of the factory are guilty of the offence except in cases where the liability definitely rests on one under the provisions of the Act or the provisions of Section 93 of the Act apply. Any contravention as aforesaid can be penalised with—

(a) imprisonment for a term which may extend to two years ; or

(b) fine which may extend to one lakh rupees ; or

(c) both fine and imprisonment subject to the limitation contained above.

In case the contravention is continued after conviction, the court is empowered to impose a further fine which may extend to one thousand rupees for each day on which the contravention is so continued :

Provided that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under Section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than twenty five thousand rupees in the case of an accident causing death and five thousand rupees in the case of an accident causing serious bodily injury.

Explanation.—In this section and in Section 99 "serious bodily injury" means an injury which involves, or in all probability will involve, the permanent loss of the use of, or permament injury to, any limb or the permanent loss of, or injury to, sight or hearing, or the fracture of any bone, but shall not include, the fracture of bone or joint (not being fracture of more than one bone or joint) of any phalanges of the hand or foot.

In case of prosecution under Section 6(1) read with Section 92 the onus lies on the prosecution to prove that workmen were employed by the management.[1]

In *State of Maharashtra* v. *V.S. Raghavan, Manager, Lorcom Factory, Chikalthana, Aurangabad*,[2] it was held that the provisions of Section 92 do not indicate that the prosecution under that section should be a joint prosecution of the occupier and manager or that they should be simultaneously prosecuted. In a given case, it may be that the manager may be responsible for the offence, so also the occupier. For the same offence both of them can be held guilty not necessarily arising out of the same or joint prosecution. Even if they are separately prosecuted, at the most it means that even if one of them is prosecuted it should not be open to the other in another prosecution to contend that the real culprit is already convicted or held responsible. Inspite of fixing of the criminal responsibility of one, it will be open for the prosecution to prosecute the other and hold him responsible for the same act. The prosecution cannot be said to be bad merely because it is launched against the manager or occupier alone.

It was held in *General Manager, Wheel & A.P., Bangalore* v. *State of Karnataka*,[3]

1. *V.P. Gopala Rao* v. *Public Prosecutor, Andhra Pradesh*, AIR 1970 SC 66.
2. (1989) 2 Lab LJ 427 (Bom).
3. (1996) 1 LLJ 943 (Kar).

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that the requirement of obtaining sanction to prosecute is mandatory and taking cognizance of an offence in the absence of sanction cannot be allowed to stand and has to be quashed.

Section 93. Liability of owner of premises in certain circumstances.—Section 93(1) provides that where in any premises separate buildings are leased to different occupiers for use as separate factories, the owner of the premises shall be responsible for the provision and maintenance of common facilities and services, such as approach roads, drainage, water supply, lighting and sanitation.

Section 93(2) empowers the Chief Inspector, subject to the control of the State Government, to issue order to the owner of the premises in respect of the carrying out of the provisions of sub-section (1).

Under Section 93(3) where in any premises independent or self-contained floors or flats are leased to different occupiers for use as separate factories the owner of the premises shall be liable as if he were the occupier or manager of a factory, for any contravention of the provisions of this Act in respect of—

(i) latrines, urinals and washing facilities in so far as the maintenance of the common supply for these purposes is concerned ;

(ii) fencing of machinery and plant belonging to the owner and not specifically entrusted to the custody or use of an occupier ;

(iii) safe means of access to floors or flats and maintenance and cleanliness of staircases and common passages ;

(iv) precautions in case of fire ;

(v) maintenance of hoists and lifts ; and

(vi) maintenance of any other common facilities provided in the premises.

In *State of Maharashtra* v. *Jamnabhai Purshottam*[1] the premises were given over to partnership firms in return for periodic payment. The owner had no control over them. The owner was prosecuted for failure to take out licences by the firm. It was held that the owner is not liable. If there is no connection between the owner and the workmen in the sense that they work without the permission and without an agreement with him, there would be no question of the liability of the owner as an occupier. The liability of the occupier is patent but the liability of owner arises only when the machinery and plant is not specifically entrusted to the custody or use of an occupier.

Under Section 93(4) the Chief Inspector shall have, subject to the control of the State Government, power to issue orders to the owner of the premises in respect of the carrying out of the provisions of sub-section (3).

Section 93(5) lays down that the provisions of sub-section (3) relating to the liability of the owner shall apply where in any premises independent rooms with common latrines, and washing facilities are leased to different occupiers for use as separate factories. But the owner shall be responsible also for complying with the requirements relating to the provisions and maintenance of latrines, urinals and washing facilities.

Section 93(6) empowers the Chief Inspector, subject to the control of the State Government, to issue orders to owner of the premises referred to in sub-section (5) in respect of the carrying out of the provisions of Section 46 or Section 48.

According to Section 93(7) wherein any premises, portions of a room or a shed are leased to different occupiers for use as separate factories, the owner of the premises shall be liable for any contravention of the provisions of—

(i) Chapter III, except Sections 14 and 15 ;

1. AIR 1968 SC 33.

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(ii) Chapter III, except Sections 22, 23, 27, 34, 35 and 36 ;

Provided that in respect of the provisions of Sections 21, 24 and 32 the owner's liability shall be only in so far as such provisions relate to things under his control ; and

Provided further that the occupier shall be responsible for complying with the provisions of Chapter IV in respect of plant and machinery belonging to or supplied by him ;

(iii) Section 42.

Section 93(8) empowers the Chief Inspector, subject to the control of the State Government to issue orders to the owner of the premises in respect of the carrying out of the provisions of sub-section (7).

Section 93(9) lays down that in respect of sub-sections (5) and (7), while computing for the purposes of any of the provisions of this Act, the total number of workers employed, the whole of the premises shall be deemed to be a single factory.

Section 94. Enhanced penalty after previous conviction.—According to Section 94(1) if any person, who has been convicted of any offence punishable under Section 92, is again guilty of an offence involving a contravention of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to three years or with the fine which shall not be less than ten thousand rupees but which may extend to two lakh rupees or with both :

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a fine of less than ten thousand rupees :

Provided further that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under Section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than thirty five thousand rupees in the case of an accident causing death and ten thousand rupees in the case of an accident causing serious bodily injury.

(2) For the purposes of sub-section (1), no cognizance shall be taken of any conviction made more than two years before the commission of the offence for which the person is subsequently being convicted.

Section 95. Penalty for obstructing Inspector.—Under Section 95, whoever, wilfully obstructs an Inspector in the exercise of any power conferred on him by or under this Act, or fails to produce on demand by an Inspector any register or other documents in his custody kept in pursuance of this Act or of any rules made thereunder, or conceals or prevents any worker in a factory from appearing before or being examined by an Inspector, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

Section 96. Penalty for wrongfully disclosing results of analysis under Section 91.—Under Section 96, whoever, except in so far as it may be necessary for the purposes of a prosecution for any offence punishable under this Act, publishes or discloses to any person the results of analysis made under Section 91, shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.

Section 96-A. Penalty for contravention of the provisions of Section 41-B, 41-C and 41-H.—(1) Whoever fails to comply with or contravents any of the provisions of Sections 41-B, 41-C or 41-H or the rules made thereunder, shall, in respect of such failure or contravention, be punishable with imprisonment for a term which may extend to seven years and with fine which may extend to two lakh rupees, and in case the failure or contravention continues, with additional fine which may extend to five

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thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.

(2) If the failure or contravention referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to ten years.

Section 97. Offences by workers.—Section 97(1) lays down that if any worker employed in a factory contravenes any provisions of this Act, or any rules or orders made thereunder, imposing any duty or liability on workers, he shall be punishable with fine which may extend to five hundred rupees. The above provisions are subject to the provisions of Section 111 of the Act.

Section 97(2) lays down that where a worker is convicted of an offence punishable under sub-section (1), the occupier or manager of the factory shall not be deemed to be guilty of an offence in respect of that contravention, unless it is proved that he failed to take all reasonable measures for its prevention.

Section 98. Penalty for using false certificate of fitness.—According to Section 98, whoever knowingly uses or attempts to use, as a certificate of fitness granted to himself under Section 70, a certificate granted to another person, shall be punishable with imprisonment for a term which may extend to two months or with fine which may extend to one thousand rupees or with both.

Section 99. Penalty for permitting double employment of child.—According to Section 99 if a child works in a factory on any day on which he has already been working in another factory, the parent or guardian of the child or the person having custody of or control over him or obtaining any direct benefit from his wages, shall be punishable with fine which may extend to one thousand rupees unless it appears to the Court that the child so worked without the consent or connivance of such parent, guardian or person.

Section 101. Exemption of occupier or manager from liability in certain cases.—Section 101 exempts the occupier or manager of a factory from liability for an offence punishable under this Act, if the following conditions are cumulatively satisfied with—

(i) the occupier or manager must have duly made a complaint charging another person as the actual offender ;

(ii) the occupier or manager must have given at least 3 days' clear notice in writing of his intention so to make a complaint ;

(iii) the person charged as the actual offender must have been brought before the criminal court at the time appointed for the hearing of the charge against the occupier or the manager or at any adjourned hearing, such hearing not being adjourned for a period exceeding 3 months ;

(iv) the occupier or the manager must have proved to the satisfaction of the criminal court that—

(a) he has used due diligence to enforce the execution of this Act ;

(b) such other person (who has been charged as the actual offender) committed the offence ; and

(c) such offence was committed without his knowledge, consent or connivance.

If the above conditions are fulfilled the other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory. But in seeking to prove as aforesaid the occupier or manager of the factory, as the case may be, may be examined on oath, and his evidence and that of any witness whom he calls in his support shall be subject to cross-examination on behalf of

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the person he charges as the actual offender and by the prosecutor. It is further provided that, if the person charged as the actual offender by the occupier or manager cannot be brought before the court at the time appointed for hearing the charge, the court shall adjourn hearing from time to time for a period not exceeding three months and if by the end of the said period the person charged as the actual offender cannot still be brought before the court, the court shall proceed to hear the charges against the occupier or manager and shall if the offence be proved, convict the occupier or manager.

It was held in *Superintendent and Remembrancer of Legal Affairs* v. *L.N. Birla*,[1] that the Magistrate has no power to convict the alleged actual offender or discharge the manager or occupier until the proof envisaged by Section 101 of the present Act is before him ; and an admission of the offence by the alleged actual offender is no proof that the occupier or manager had used due diligence to prevent the offence or that the offence was committed without his connivance.

Where the occupier or the manager of a factory admits the guilt under Section 92 of the Act, but alleges the clerk of the factory to be the actual offender, the onus of establishing the innocence as envisaged by Section 101 is on such occupier or the manager as the case may be.[2] The other person, who is alleged to be the actual offender by the occupier or the manager of a factory has a right to cross-examine such occupier or the manager as the case may be.[3]

In *State of Gujarat* v. *Jethalal Ghelabhai Patel*,[4] it was laid down that "where the occupier or manager proves that somebody else has removed the fencing without his knowledge, consent or connivance, this alone does not exempt him from liability but he has to prove that he has used due diligence to enforce the execution of the Act. It means he has to prove that who has actually removed it ; that it was removed without his knowledge, consent or connivance ; and that he has exercised due diligence to enforce the execution of the Act. Where an occupier or a manager is charged with an offence he is entitled to make a complaint in his own turn against any person who was the actual offender and on proof of the commission of the offence by such person the occupier or the manager is absolved from liability. The occupier or manager of a factory may be exempted from liability provided his case can be brought within the corners of Section 101 of the Act and if they prove that they are not the real offenders but who, in fact, is.[5]

In *Maneklal Jinabhai* v. *State of Gujarat*,[6] the manager of the factory was charged with offence under the Act. The manager charged certain persons as real offenders who admitted that the offence was committed by them without knowledge, consent or connivance of the manager even after receiving warning from him against double employment. These statements were not challenged by the prosecution. There was no evidence to prove passive co-operation from manager to commit offence and evidence given by him was not challenged by the prosecution but was corroborated. It was held that the manager had established that he was not real offender and that persons charged by him had committed the offence. It was further held that he had used due diligence to enforce execution of the Act and had proved that persons charged by him had committed offence without his knowledge, consent or connivance.

Section 102. Power of court to make order.—Section 102(1) lays down that where occupier or manager of a factory is convicted of an offence punisnable under this

1. AIR 1939 Cal 724.
2. *Provincial Government* v. *Ganpat*, AIR 1943 Nag 243.
3. *Government of Bengal* v. *F.A. Marray*, AIR 1928 Cal 557.
4. AIR 1964 SC 779.
5. *State of Gujarat* v. *Kantilal Manilal Bhikhalal*, AIR 1964 SC 1893.
6. AIR 1967 SC 1226.

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Act the court may, in addition to awarding any punishment, by order in writing require him, within a period specified in the order (which the court may, if it thinks fit and on application in such behalf, from time to time extend), to take such measures as may be so specified for remedying the matters in respect of which the offence was committed.

Section 102(2) provides that where an order is made under sub-section (1), the occupier or manager of the factory, as the case may be, shall not be liable under this Act in respect of the continuation of the offence during the period or extended period, if any, allowed by the court. But if on the expiry of such period or extended period, as the case may be, the order of the court has not been fully complied with, the occupier or manager, as the case may be, shall be deemed to have committed a further offence, and may be sentenced therefor by the court to undergo imprisonment for a term which may extend to six months or to pay a fine which may extend to one hundred rupees for every day after such expiry on which the order has not been complied with, or both to undergo such imprisonment and to pay such fine as aforesaid.

Section 103. Presumption as to employment.—Under Section 103 if a person is found in a factory at any time, except during interval for meals or rest, when the work is going on or the machinery is in motion, he shall until the contrary is proved, be deemed for the purposes of this Act and the rules made thereunder to have been at the time employed in the factory.

Section 104. Onus as to age.—According to Section 104(1) when any act or omission would, if a person were under a certain age, be an offence punishable under this Act, and such person is in the opinion of the court *prima facie* under such age, the burden shall be on the accused to prove that such person is not under such age.

Under Section 104(2) a declaration in writing by a certifying surgeon relating to a worker that he has personally examined him and believe him to be under the age stated in such declaration, shall for the purposes of this Act and the rules made thereunder, be admissible as evidence of the age of that worker.

Section 104-A. Onus of proving limits of what is practicable, etc.—In any proceeding for an offence for the contravention of any provision of this Act or rules made thereunder consisting of a failure to comply with a duty or requirement to do something, it shall be for the person who is alleged to have failed to comply with such duty or requirement, to prove that it was not reasonably practicable or, as the case may be, all practicable measures were taken to satisfy the duty or requirement.

Section 105. Cognizance of offences.—According to Section 105(1) no court shall take cognizance of any offence under this Act except on complaint by, or with the previous sanction in writing of, an Inspector.

According to Section 105(2) no court below that of a Presidency Magistrate or of a Magistrate of the first class, shall try any offence punishable under the Act.

In *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Sen*,[1] it was pointed out that the question of sanction of the Inspector before making a complaint arises only where the complaint is not made by the Inspector but, by someone else.

Section 106. Limitation of prosecution.—Section 106 provides that no court shall take cognizance of offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector. But where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.

Explanation.—For the purposes of this section—

(a) in the case of a continuing offence, the period of limitation shall be

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1. AIR 1949 Cal 604.

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computed with reference to every point of time during which the offence continues ;

(b) where for the performance of any act time is granted or extended on an application made by the occupier or manager of a factory, the period of limitation shall be computed from the date on which the time so granted or extended expired.

A report to the Inspector was made that an accident had taken place and the whole palm with five fingers was crushed. The report did not state that the dangerous parts of the machinery were in such a position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced. It was also not stated that dangerous parts of the machinery were not securely fenced by safeguards of substantial construction or that they were not kept in position while the parts of the machinery they were facing, were in motion or in use. It was held that on reading the report it could not be said that an offence under Section 21(1)(iv)(c) had been committed. Hence the Inspector cannot be said to have acquired knowledge of the commission of the offence when he received the report.[1]

Section 106-A. Jurisdiction of a court for entertaining proceedings, etc., for offence.—For the purposes of conferring jurisdiction on any court in relation to an offence under this Act or the rules made thereunder in connection with the operation of any plant, the place where the plant is for the time being situate shall be deemed to be the place where such offence has been committed.

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1. *P.D. Jambhekar* v. *State of Gujarat*, AIR 1973 SC 309.

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CHAPTER XI
SUPPLEMENTAL

Section 107. Appeals.—According to Section 107(1) the manager of a factory on whom an order in writing by an Inspector has been served under the provisions of this Act or the occupier of the factory may, within thirty days of the service of the order appeal against it to the prescribed authority, and such authority may subject to rules made in this behalf by the State Government, confirm, modify or reverse the order.

Section 107(2) lays down that the appellate authority may, or if so required in the petitioner appeal shall, hear the appeal with the aid of the assessors. One of the assessors shall be appointed by the appellate authority and the other by such body representing the industry concerned as may be prescribed. The above provisions are subject to any rules made in this behalf by the State Government which may prescribe classes of appeals which shall not be heard with the aid of assessors. It is further stated that where no assessor is appointed by such body before the time fixed for hearing the appeal, or if the assessor so appointed fails to attend the hearing at such time, the appellate authority may unless satisfied that failure to attend is due to a sufficient cause, proceed to hear the appeal without the aid of such assessor or if it thinks fit, with the aid of any assessor.

Under Section 107(3) the appellate authority may, if it thinks fit, suspend the orders appealed against pending the decision of the appeal. But these provisions are subject to such rules as the State Government may make in this behalf and subject to such conditions as to partial compliance or the adoption of temporary measures as the appellate authority may, in any case, think fit to impose.

Section 108. Display of notices.—According to Section 108(1), in addition to the notices required to be displayed in any factory by or under this Act, there shall be displayed in every factory a notice containing such abstracts of this Act or the rules made thereunder as may be prescribed and also the name and address of the Inspectors and the certifying surgeon.

According to Section 108(2) all notices required by or under this Act to be displayed in a factory shall be in English and in a language understood by the majority of the workers in the factory, and shall be displayed at some conspicuous and convenient place at or near the main entrance to the factory and shall be maintained in a clean and legible condition.

Under Section 108(3) the Chief Inspector may, by order in writing served on the manager of any factory, require that there shall be displayed in the factory any other notice or poster relating to the health, safety or welfare of the workers in the factory.

Section 109. Service of notices.—The State Government may make rules prescribing the manner of service of orders under the Act on owners, occupiers or managers of factory.

Section 110. Returns.—Section 110 empowers the State Government to make rules requiring owners, occupiers or managers of factories to submit such returns occasional or periodical, as may, in its opinion, be required for the purpose of this Act.

Section 111. Obligations of workers.—(1) No worker in a factory—

(a) shall wilfully interfere with or misuse any appliance, convenience or other thing provided in a factory for the purposes of securing health, or safety of

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the workers therein ;

(b) shall wilfully and without reasonable cause do anything likely to endanger himself or others ; and

(c) shall wilfully neglect to mke use of any appliance, or other thing provided in the factory for the purposes of securing the health or safety of workers therein.

(2) If any worker employed in a factory contravenes any of the provisions of this section or any rule or order made thereunder, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both.

Section 111-A. Right of workers, etc.—Every worker shall have the right to—

(i) obtain from the occupier, information relating to workers' health and safety at work ;

(ii) get trained within the factory wherever possible, or, to get himself sponsored by the occupier for getting trained at a training centre or institute, duly approved by the Chief Inspector, where training is imparted for workers' health and safety at work ;

(iii) represent to the Inspector directly or through his representative in the matter of inadequate provision for protection of his health or safety in the factory.

Section 112. General Power to make rules.—Section 112 authorises the State Government to make rules providing for any matter which under any provisions of this Act is to be or may be prescribed or which may be considered expedient in order to give effect to the purposes of this Act.

A levy in the nature of a fee does not cease to be of that character merely because of the presence of an element of compulsion or coercion nor it is a postulate of a firm that it must have direct relation of the actual services rendered by the authority to individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service the levy would be in the nature of a fee and not in the nature of a tax.[1]

Section 113. Powers of Centre to give directions.—Section 113 empowers the Central Government to give directions to a State Government as to the carrying into execution of the provisions of this Act.

Section 114. No charge for facilities and conveniences.—According to Section 114 no fee or charge shall be realised from any worker in respect of any arrangement or facilities to be provided, or any equipments or appliances to be supplied by the occupier under the provisions of this Act. But these provisions are made subject to the provisions of Section 46 of the Act.

Section 115. Publication of rules.—Under Section 115(1) all rules made under this Act shall be published in the official Gazette, and shall be subject to the conditions of previous publication. It is further laid down that the date to be specified under clause (3) of Section 23 of the General Clauses Act, 1897, shall not be less than forty five days from the date on which the draft of proposed rules was published.

(2) Every rule made by the State Government under this Act shall be paid, as soon as may be after it is made, before the State Legislature.

Section 116. Application of Act to Government factories.—According to Section 116 unless otherwise provided, this Act shall apply to factories belonging to the Central or any State Government.

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1. *D.C. & G. Co.* v. *Chief Commr. Delhi.* AIR 1971 SC 344.

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Section 117. Protection to persons acting under this Act.—Section 117 lays down that no suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act. It was held in *Public Prosecutor* v. *Managaladas*,[1] that the words of Section 117 are wide enough not only to cover the officers or servants of the Government but also the managers of factories.

It was held in *State of Gujarat* v. *Kansara Manilal*,[2] that "the protection conferred by Section 117 can only be claimed by a person who can plead that he was required to do or omit to do something under the Act or that he intended to comply with any of its provisions. It cannot confer immunity in respect of actions which are not done under the Act but are done contrary to it. Even assuming that an act includes an omission as stated in the General Clauses Act, the omission also must be one which is enjoined by the Act. It is not sufficient to say that he was honest. That would bring it only within the words 'good faith'. It is necessary further to establish that what is complained of is something which the Act requires should be done or should be omitted to be done. There must be compliance or an intended compliance with a provision of the Act, before the protection can be claimed. The section cannot cover a case of a breach or an intended breach of the Act, however, honest the conduct be otherwise".

Section 118. Restriction on disclosure of information.—Section 118(1) lays down that no Inspector shall, while in service or after leaving the service, disclose otherwise than in connection with the execution, or for the purposes of this Act, any information relating to any manufacturing or commercial business or any working process which may come to his knowledge in the course of his official duties.

Section 118(2) says that nothing in sub-section (1) shall apply to any disclosure of information made with the previous consent in writing of the owner of such business or process or for the purposes of any legal proceeding (including arbitration) pursuant to this Act or of any criminal proceeding which may be taken whether pursuant to this Act or otherwise or for the purposes of any report of such proceeding as aforesaid.

Section 118(3) provides that if any Inspector contravenes the provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Section 118-A. Restriction on disclosure of information.—(1) Every Inspector shall treat as confidential the source of any complaint brought to his notice on the breach of any provision of this Act.

(2) No Inspector shall, while making an inspection under this Act, disclose to the occupier, manager or his representative that the inspection is made in pursuance of the receipt of a complaint :

Provided that nothing in this sub-section shall apply to any case in which the person who has made the complaint has consented to disclose his name.

Section 119. Act to have effect notwithstanding anything contained in Act 37 of 1970.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Central Labour (Regulation and Abolition) Act, 1970, or any other law for the time being in force.

In *Government of Andhra Pradesh and another* v. *Bhadrachalam Paper Boards Ltd. and anothers*,[3] the Government of Andhra Pradesh by a notification abolished contract labour in certain processes and operations in Bhadrachalam Paper Boards Ltd. and in Andhra Steel Corporation, Visakhapatnam. It was contended that in view of

1. AIR 1958 AP 79.
2. AIR 1964 SC 1893.
3. (1991) 1 Lab LJ 115 (AP).

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amended definition of Section 2(1) (after amendment in 1976) the Contract Labour (Regulation and Abolition) Act, 1970 ceased to apply to factories to which the Factories Act applies. It was held that the definition of 'worker' in Section 2(1) of the Factories Act includes even a worker engaged through a contractor, and all the beneficial provisions in the Act apply to such workers. Therefore a contract labour would be entitled to all benefits and facilities (such as canteen) under the Act.

It was further held that Section 119 of the Factories Act does not exclude applicability of Contract Labour (Regulation and Abolition) Act. Section 119 of the Factories Act gives only overriding effect to the provisions of Factories Act. Where provisions of Factories Act are inconsistent with the provisions of Contract Labour Act, the provisions of former shall prevail but where the provisions in the two Acts are not inconsistent with each other both shall apply to factories. There is no provision in the Factories Act for abolition of contract labour in any factory to which the Factories Act applies. Section 119 of the Factories Act does not take away the power of the Government under Section 10 of the Contract Labour Act to issue notification abolishing contract labour.

Section 120. Repeal and Savings.—The enactments set out in the table appended to this section are hereby repealed :

Provided that anything done under the said enactments which could have been done under this Act if it had then been in force shall be deemed to have been done under this Act. (Table has been repealed).

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THE INDUSTRIES (DEVELOPMENT AND REGULATION) ACT, 1951

CHAPTER I
PRELIMINARY

Section 1. Scope and Object.—The object of the Industries (Development and Regulation) Act, 1951 is to provide the Central Goverment with means of implementing their industrial policy which was approved by the Central Legislature. This Act has brought under central control the development and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all India import. The planning of future development on sound and balance lines is sought to be secured by the licensing of all new undertakings by the Central Government. The Act confers on Government power to make rules for the registration of existing undertakings, for regulating the production and development of the industries in the schedule and for consultation with the State Governments on these matters. The Act also makes provisions for the constitution of a Central Advisory Council, prior consultation with which will be obligatory before the Central Government takes certain measures such as the revocation of a licence or registration or taking over the control and management of any industrial concern.

This Act does not empower the Government to issue an order or notification retrospectively.[1] It extends to the whole of India including Jammu and Kashmir. It came into force on 28th May, 1952. But it was applied to the State of Jammu and Kashmir on 15th February, 1962.

Section 2. Declaration as to expediency of control by the Union.—Section 2 declares that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule of the Act.

It was held in *Harakchand* v. *Union of India*,[2] that a distinction has been made between "scheduled industries" and "industrial undertakings" throughout the Act and separate provision has been made for registration of industrial undertakings, for licensing of new industrial undertakings and for the direct management of the industrial undertaking by the Central Government in certain cases. Provisions have also been made for regulation of scheduled industries, procedure for grant of licences, power to cause investigation to be made etc. It may, therefore, be said that the expression "industrial undertakings" and "scheduled industry" are not used synonymously in the Act. The expression "industry" specified in the schedule should not therefore, be construed as a scheduled industry carried on in the manner of an industrial undertaking.

Section 3. Definitions :

(a) **"Advisory Council"** means the Central Advisory Council established under Section 5.

(b) **"Ancillary industrial undertaking"** means an industrial undertaking which, in accordance with the proviso to sub-section (1) of Section 11-B and the

1. *G.P. Shivaprakash* v. *Union of India*, AIR 1968 Mys 245.
2. AIR 1970 SC 1453.

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requirements specified under that sub-section, is entitled to be regarded as an ancillary industrial undertaking for the purposes of this Act.

(ab) **"Current assets"** means bank balances and cash and includes such other assets or reserves as are expected to be realised in cash or sold or consumed within a period of not more than twelve months in ordinary course of business, such as, stock-in-trade, amounts due from sundry debtors for sale of goods and for services rendered, advance tax payments and bills receivable, but does not include sums credited to a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by a comany owning an industrial undertaking.

(ac) **"Current liabilities"** means liabilities which must be met on demand or within a period of twelve months from the date they are incurred ; and includes any current liability which is suspended under Section 18-FB.

(b) **"Development Council"** means a Development Council established under Section 6.

(bb) **"existing industrial undertaking"** means—

(a) in the case of an industrial undertaking pertaining to any of the industries specified in the First Schedule as originally enacted, an industrial undertaking which was in existence on the commencement, of this Act or for the establishment of which effective steps had been taken before such commencement, and

(b) in the case of an industrial undertaking pertaining to any of the industries added to the First Schedule by an amendment thereof, an industrial undertaking which is in existence on the coming into force of such amendment or for the establishment of which effective steps had been taken before the coming into force of such amendment.

(c) **"factory"** means any premises, including the precinct thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on—

(i) with the aid of power, provided that fifty or more workers are working or were working thereon on any day of the preceding twelve months ; or

(ii) without the aid of power, provided that one hundred or more workers are working or were working thereon on any day of the preceding twelve months and provided further that in no part of such premises any manufacturing process is being carried on with the aid of power.

(cc) **"High Court"** means the High Court having jurisdiction in relation to the place at which the registered office of a company is situated.

(d) **"Industrial undertaking"** means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government.

In *E.S. & Co. Mirzapur* v. *Textile Mills Mazdoor Union*,[1] it ws held that the words 'Industrial undertaking' are given by the Act a meaning which is separate and distinct from the word 'industry'. The word 'Industry' is envisaged as covering all kinds of undertakings engaged in working on materials mentioned in the first schedule. If the manufacture or production of iron and steel is carried on anywhere under any circumstances, that would be an industry engaged in the manufacture and production of iron and steel. It would not, however, be an industrial undertaking. To be an industrial undertaking, the work of manufacture or production should be carried on in one or more

1. AIR 1958 All 80

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factories by person or authority including Government. Clearly all undertakings engaged in the manufacture or production of any particular item mentioned in the first schedule would be carrying on the industry mentioned in that schedule. But a single undertaking of nature would not be synonymous with that 'industry'.[1]

In *H.R. Banthra* v. *Union of India*,[2] it was held that the expression 'scheduled industry' is not synonymous with the expression 'industrial undertaking' as the Act has made a distinction between these two and the declaration under Section 2 applies not only to industrial undertaking but also to other industries.

(dd) "New article" in relation to an industrial undertaking which is registered or in respect of which a licence or permission has been issued under this Act, means—

(a) any article which falls, under an item in the First Schedule other than the item under which articles ordinarily manufactured or produced in the industrial undertaking at the date of registration or issue of the licence or permission, as the case may be, fall ;

(b) any article which bears a mark as defined in the Trade Marks Act, 1950, or which is the subject of a patent, if at the date of registration or issue of the licence or permission, as the case may be, the industrial undertaking was not manufacturing or producing such article bearing that mark or which is the subject of the patent.

(e) **"notified order"** means an order notified in the official Gazette.

(f) **'owner'** in relation to an industrial undertaking means the person who, or the authority which, has the ultimate control over the affairs of the undertaking, and, where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent, shall be deemed to be the owner of the undertaking.

(g) **'prescribed'** means prescribed by rules made under this Act.

(h) **'schedule'** means a Schedule to this Act.

(i) **'scheduled industry'** means any of the industries specified in the First Schedule.

(j) **'Small scale industrial undertaking'** means an industrial undertaking which, in accordance with the requirements specified under sub-section (1) of Section 11-B, is entitled to be regarded as a small scale industrial undertaking for the purposes of this Act.

(k) words and expressions used herein but not defined in this Act and defined in the Companies Act, 1956 have the meaning respectively assigned to them in that Act.

In *National Bicycle Corporation of India Ltd.* v. *Gopal B. Kaluskar & others*,[3] the Hind Cycles Ltd. was taken over by the Government by the Hind Cycles Ltd. & Sen Raleigh Ltd. (Nationalisation) Act, 1980. Some employees of the Hind Cycle were retrenched on October 21, 1975. The Tribunal passed award setting aside the retrenchment. It was held that if the retrenchment was *void ab initio*, it follows that respondents are deemed to be employees of Hind Cycles Ltd. and by virtue of Section 13(1) the respondents became the workmen of the Central Government and/or the petitioner. Therefore, the retrenched workmen automatically became the workmen of Central Government and/or the petitioner with effect from the appointed day *i.e.*, Oct. 15, 1980, the date of enforcement of the Act of 1980. The monetary liabilities of the

1. AIR 1958 All 80.
2. (1969) 2 SCC 166.
3. (1995) 1 LLJ 525 (Bom).

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company to pay back wages for the period prior to october 15, 1980 are undoubtedly of the company and the same are enforceable by making of a claim against the Commissioner of Payments. Respondents would become employees of the petitioner Government Company from the date of nationalisation. Therefore the petitioner would be liable to comply with the award in so far as liability after the appointed day of nationalisation is concerned.

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CHAPTER II
THE CENTRAL ADVISORY COUNCIL AND THE DEVELOPMENT COUNCILS

Section 5. Establishment and constitution of Central Advisory Council and its functions.—(1) For the purpose of advising it on matters concerning the development and regulation of scheduled industries, the Central Government may, by notified order, establish a Council to be called the Central Advisory Council.

(2) The Advisory Council shall consist of a Chairman and such other members, not exceeding thirty in number, all of whom shall be appointed by the Central Government from among persons who are in its opinion capable of representing the interests of—

(a) owners of industrial undertakings in scheduled industries ;

(b) persons employed in industrial undertakings in scheduled industires ;

(c) consumers of goods manufactured or produced by schedule industires ;

(d) such other class of persons including primary producers, as in the opinion of the Central Government, ought to be represented on the Advisory Council.

(3) The term of office of, the procedure to be followed in the discharge of their function by, and the manner of filling causal vacancies among members of the Advisory Council shall be such as may be prescribed.

(4) The Central Government shall consult the Advisory Council in regard to the making of any rules, other than the first rules to be made under sub-section (3) ; and may consult the Advisory Council in regard to any other matter connected with the administration of this Act in respect of which the Central Government may consider it necessary to obtain the advice of the Advisory Council.

(3) The term of office of, the procedure to be followed in the discharge of their function by, and the manner of filling casual vacancies among members of the Advisory Council shall be such as may be prescribed.

(4) The Central Government shall consult the Advisory Council in regard to the making of any rules, other than the first rules to be made under sub-section (3) ; and may consult the Advisory Council in regard to any other matter connected with the administration of this Act in respect of which the Central Government may consider it necessary to obtain the advice of the Advisory Council.

Section 6. Establishment and constitution of Development Councils and their functions.—(1) The Central Government may by notified order, establish for any scheduled industry or group of scheduled industries, a body of persons to be called a Development Council which shall consist of members who in the opinion of the Central Government are—

(a) persons capable of representing the interests of owners of industrial undertakings in the scheduled industry or group of scheduled industries ;

(b) persons having special knowledge of matters relating to the technical or other aspects of the scheduled industry or group of scheduled industries ;

(c) persons capable of representing the interests of persons employed in industrial undertakings in the scheduled industry or group of scheduled

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industries ;

(d) persons not belonging to any of the aforesaid categories, who are capable of representing the interests of consumers of goods manufactured or produced by the scheduled industry or group of scheduled industries.

(2) The number and the term of office of, and the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among members of Development Council, shall be such as may be prescribed.

(3) Every Development Council shall be, by virtue of this Act, a body corporate by such name as may be specified in the notified order establishing it and may hold and transfer property and shall by the said name sue and be sued.

(4) A Development Council shall perform such functions of a kind specified in the Second Schedule as may be assigned to it by the Central Government and for whose exercise by the Development Council it appears to the Central Government expedient to provide in order to increase the efficiency or productivity in the scheduled industry or group of scheduled industries for which the Development Council is established, to improve or develop the service that such industry or group of industries renders or could render to the community, or to enable such industry or group of industries to render such service more economically.

(5) A Development Council shall also perform such other functions as it may be required to perform by or under any other provision of this Act.

Section 7. Reports and Accounts of Development Councils.—(1) A Development Council shall prepare and transmit to the Central Government and the Advisory Council, annually, a report setting out what has been done in the discharge of its functions during the financial year last completed.

(2) The report shall include a statement of the accounts of the Development Council for that year, and shall be transmitted as soon as accounts therefor have been audited, together with a copy of any report made by the auditors on the accounts.

(3) The statement of account shall be in such form as may be prescribed being a form which shall conform to the best commercial standards, and the statement shall show the total of remuneration and allowances paid during the years to members and officers of the Council.

(4) A copy of each such report of a Development Council, or made by the auditors on its accounts, shall be laid before Parliament by the Central Government.

Section 8. Dissolution of Development Councils.—(1) The Central Government may, if it is satisfied that a Development Council should cease to continue in being, by notified order, dissolve Development Council.

(2) On the dissolution of a Development Council under sub-section (1), the assets of the Development Council, after its liabilities, if any, are met therefrom, shall vest in the Central Government for the purposes of this Act.

Section 9. Imposition of cess on scheduled industries in certain cases.—(1) There may be levied and collected as a cess for the purposes of this Act on all goods manufactured or produced in any such scheduled industry as may be specified in this behalf by the Central Government by notified order a duty of excise at such rate as may be specified in the notified order, and different rates may be specified for different goods or different classes of goods :

Provided that no such rate shall in any case exceed 13 paise per cent, of the value of goods.

Explanation.—In this sub-section, the expression "valued" in relation to any goods shall be deemed, to be wholesale cash price for which such goods of the like kind and quality are sold or are capable of being sold for delivery at the place of manufacture

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and at the time of their removal therefrom without any abatement or deduction whatever except trade discount and the amount of duty then payable.

(2) The cess shall be payable at such interval, within such time and in such manner as may be prescribed and any rules made in this behalf may provide for the grant of rebate for prompt payment of the cess.

(3) The said cess may be removed in the same manner as an arrear of land revenue.

(4) The Central Government may handover the proceeds of the cess collected under this section in respect of the goods manufactured or produced by any scheduled industry or group of scheduled industries to the Development Council established for the industry or group of industries, and where it does so, the Development Council shall utilise the said proceeds—

(a) to promote scientific and industrial research with reference to the scheduled industry or group of scheduled industries in respect of which the Development Council is established ;

(b) to promote improvements in design and quality with reference to the products of such industry or group of industries ;

(c) to provide for the training of technicians and labour in such industry or group of industries ;

(d) to meet such expenses in the exercise of its functions and its administrative expenses as may be prescribed.

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CHAPTER III
REGULATION OF SCHEDULED INDUSTRIES

Section 10. Registration of existing industrial undertakings.—(1) The owner of every existing industrial undertaking, not being the Central Government, shall, within such period as the Central Government may, by notification in the official Gazette fix in this behalf with respect to industrial undertaking generally or with respect to any class of them, register the undertaking in the prescribed manner.

(2) The Central Government shall also cause to be registered in the same manner every existing industrial undertaking of which it is the owner.

(3) Where an Industrial undertaking is registered under this section there shall be issued to the owner of the undertaking or the Central Government, as the case may be, a certificate of registration containing the productive capacity of the industrial undertaking and such other particulars as may be prescribed.

(4) The owner of every industrial undertaking to whom a certificate of registration has been issued under this section before the commencement of the Industries (Development and Regulation) Amendment Act, 1973, shall, if the undertaking falls within such class of undertakings as the Central Government may, by notification in the official Gazette, specify in this behalf produce, within such period as may be specified in such notification the certificate of registration for entering therein the productive capacity of the industrial undertaking and other prescribed particulars.

(5) In specifying the productive capacity in any certificate of registration issued under sub-section (3), the Central Government shall take into consideration the productive or installed capacity of the industrial undertaking as specified in the application for registration made under sub-section (1), the level of production immediately before the date on which the application for registration was made under sub-section (1), the level of the highest annual production during the three years immediately preceding the commencement of the Industries (Development and Regulation) Amendment Act, 1973, the extent to which production during the said period was utilised for export and such other factors as the Central Government may consider relevant.

Sections 10 and 11 of this Act require the registration or licensing of an industrial undertaking engaged in industry and not the registration or licensing of the industry as a whole.[1]

Section 10-A. Revocation of registration in certain cases.—If the Central Government is satisfied that the registration of any industrial undertaking has been detained by misrepresentation as to an essential fact or that any industrial undertaking has ceased to be registerable under this Act by reason of any exemption granted under this Act becoming applicable thereto or that for any other reason the registration has become useless or ineffective and therefore requires to be revoked, the Central Government may, after giving an opportunity to the owner of the undertaking to be heard, revoke the registration.

Section 11. Licensing of new industrial undertaking.—(1) No person or authority other than the Central Government, shall after the commencement of this Act, establish any new industrial undertaking, except under and in accordance with a licence

1. *E.S. & Co., Mirzapur* v. *Textile Mill Mazdoor Union*, AIR 1958 All 80.

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issued in that behalf by the Central Government :

Provided that a Government other than the Central Government may with the previous permission of the Central Government, establish a new industrial undertaking.

(2) A licence or permission under sub-section (1) may contain such conditions including in particular, condition as to the location of the undertaking and the minimum standards in respect of size to be provided therein as the Central Government may deem fit to impose in accordance with the rules, if any, made under Section 30.

Section 11-A. Licence for producing or manufacturing new articles.—The owner of an industrial undertaking not being the Central Government which is registered under Section 10 or in respect of which a licence or permission has been issued under Section 11 shall not produce or manufacture any new articles unless—

(a) in the case of an industrial undertaking registered under Section 10, he has obtained a licence for producing or manufacturing such article, and

(b) in the case of an industrial undertaking in respect of which a licence of permission has been issued under Section 11, he has had the existing licence or permission amended in the prescribed manner.

Section 11-B. Power of Central Government to specify the requirements which shall be complied with by small scale industrial undertakings.—(1) The Central Government may with a view to ascertaining which ancillary, and small scale industrial undertakings need supportive measures, exemptions or other favourable treatment under this Act to enable them to maintain their viability and strength so as to be effective in—

(a) promoting in a harmonious manner the industrial economy of the country and easing the problem of unemployment, and

(b) securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common goods,

specify, having regard to the factors mentioned in sub-section (2), by notified order, the requirements which shall be complied with by an industrial undertaking to enable it to be regarded, for the purposes of this Act, as an ancillary, or a small scale industrial undertaking and different requirements may be so specified for different purposes or with respect to industrial undertakings engaged in the manufacture or production of different articles :

Provided that no industrial undertaking shall be regarded as an ancillary industrial undertaking unless it is, or is proposed to be, engaged in—

(i) the manufacture of parts, components, sub-assemblies, toolings or intermediates ; or

(ii) rendering of services, or supplying or rendering not more than fifty per cent of its production or its total services, as the case may be, to other units for production of other articles.

(2) the factors referred to in sub-section (1) are the following namely :—

(a) the investment by the industrial undertaking in—

(i) plant and machinery, or

(ii) land, buildings, plant and machinery ;

(b) the nature of ownership of the industrial undertaking ;

(c) the smallness of the number of workers employed in the industrial undertaking ;

(d) the nature, cost and quality of the product of the industrial undertaking ;

(e) foreign exchange, if any, required for the import of any plant or machinery by the industrial undertaking, and

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(f) such other relevant factors as may be prescribed.

(3) A copy of every notified order proposed to be made under sub-section (1) shall be laid in draft before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session of the successive sessions aforesaid, both Houses agree in disapproving the issue of the proposed notified order or both Houses agree in making any modification in proposed notified order, the notified order shall not be made, or, as the case may be, shall be made only in such modified form as may be agreed upon by both the Houses.

(4) Notwithstanding anything contained in sub-section (1), an industrial undertaking which, according to the law for the time being in force, fell, immediately before the commencement of the Industries (Development and Regulation) Amendment Act, 1984, under the definition of an ancillary, or small scale industrial undertaking, shall, after such commencement, continue to be regarded as an ancillary, or small scale industrial undertaking for the purposes of this Act until the definition aforesaid is altered or superseded by any notified order made under sub-section (1).

Section 12. Revocation and amendment of licences in certain cases.—(1) If the Central Government is satisfied either on a reference made to it in this behalf or otherwise, that any person or authority, to whom or to which a licence has been issued under Section 11, has without reasonable cause, failed to establish or to take effective steps to establish the new industrial undertaking in respect of which the licence has been issued within the time specified therefor or within such extended time as the Central Government may think fit to grant in any case, it may revoke the licence.

(2) Subject to any rules that may be made in this behalf, the Central Government may also vary or amend any licence issued under Section 11 :

Provided that no such power shall be exercised after effective steps have been taken to establish the new undertaking in accordance with the licence issued in this behalf.

(3) The provisions of this section shall apply in relation to a licence issued under Section 11-A or where a licence has been amended under this section to the amendment thereof, as they apply in relation to licence issued under Section 11.

Section 13. Further provision for licensing of industrial undertaking in special cases.—(1) No owner of an industrial undertaking, other than the Central Government shall—

(a) in the case of an industrial undertaking required to be registered under Section 10, but which has been registered within the time fixed for the purpose under that section, carry on the business of that undertaking after the expiry of such period, or

(b) in the case of an industrial undertaking the registration in respect of which has been revoked under Section 10-A, carry on the business of the undertaking after the revocation, or

(c) in the case of an industrial undertaking to which the provisions of this Act did not originally apply but become applicable after the commencement of this Act for any reason, carry on the business of the undertaking after the expiryof three months from the date on which the provisions of this Act became so applicable, or

(d) effect any substantial expansion of an industrial undertaking which has been registered or in respect of which a licence or permission has been issued, or

(e) change the location of the whole or any part of any industrial undertaking which has been registered :

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except under, and in accordance with, a licence issued in that behalf by the Central Government, and in the case of a State Government, except under and in accordance with the previous permission of the Central Government.

(2) The provisions of sub-section (2) of Section 11 and of Section 12 shall apply, so far as may be, in relation to issue of licences or permissions to any industrial undertaking referred to in this section as they apply in relation to the issue of licence or permissions to a new industrial undertaking.

Explanation.—For the purposes of this section "substantial expansion" means the expansion of an existing industrial undertaking which substantially increases the productive capacity of the undertaking, or which is of such a nature as to amount virtually to a new industrial undertaking, but does not include any expansion as is normal to the undertaking having regard to its nature and the circumstances relating to such expansion.

Section 14. Procedure for the grant of licence or permission.—Before granting any licence or permission under Section 11-A, Section 13 or Section 29-B, the Central Government may require such officer or authority as it may appoint for the purpose, to make a complete investigation in respect of applications received in this behalf, and report to it the result of such investigation and in making any such investigation, the officer or authority shall follow such procedure as may be prescribed.

Section 15. Power to cause investigation to be made into scheduled industries or industrial undertaking.—Where the Central Government is of the opinion that—

(a) in respect of any scheduled industry or industrial undertaking or undertakings :

(i) there has been, or is likely to be, a substantial fall in the volume of production in respect of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertaking or undertakings, as the case may be, for which having regard to the economic conditions prevailing there is no justification ; or

(ii) there has been, or is likely to be, marked deterioration in the quality of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertakings as the case may be, which could have been or can be avoided ; or

(iii) there has been or is likely to be a rise in the price of any article or class of articles relatable to that industry or manufactured or produced in the industrial undertakings as the case may be, for which there is no justification ; or

(iv) it is necessary to take any such action as is provided in this chapter for the purpose of conserving any resources of national importance which are utilised in the industrial undertaking or undertakings, as the case may be ; or

(b) any industrial undertaking is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest ;

the Central Government may make or cause to be made a full and complete investigation into the circumstances of the case by such person or body of persons as it may appoint for the purpose.

The true object of this section is to enable the Central Government to inform itself about the position of an undertaking in respect of which action is contemplated and it is conceivable that there may be occasions when evidence may have to be examined in *camera* to elicit full information and to maintain this assurance the confidence would

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be maintained.[1]

In *Keshav Mills Ltd.* v. *Union of India*,[2] it was held that the management of the company is at any rate entitled to a hearing and an opportunity to adduce evidence and if no such opportunity has been afforded to the management at the stage of investigation it has to be afforded such opportunity when action is taken under Section 18-A in respect of the company. The principles of natural justice are not embodied rules nor can they be elevated to the position of fundamental rules. These rules can operate in areas not covered by any law validly made. They do not supplant law but supplement it. If a statutory provision can be read consistently with the principles of natural justice, the Court could do so. But if a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, then the Court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provisions the principles of natural justice.

Section 15-A. Power to investigate into the affairs of a company in liquidation.—(1) Where a company, owning an industrial undertaking is being wound up by or under the supervision of the High Court, and the business of such company is not being continued, the Central Government may, if it is of opinion that it is necessary, in the interests of the general public and in particular, in the interests of production, supply or distribution of articles or class of articles relatable to the concerned scheduled industry, to investigate into the possibility of running or restraining the industrial undertaking, make an application to the High Court praying for permission to make, or cause to be made, an investigation into such possibility by such person or body of persons as that Government may appoint for the purpose.

(2) Where an application is made by the Central Government under sub-section (1), the High Court shall, notwithstanding anything contained in the Companies Act, 1956 or in any other law for the time being in force, grant the permission prayed for.

Section 16. Power of Central Government on completion of investigation under Section 15.—(1) If after taking or causing to be made any such investigation as is referred to in Section 15 the Central Government is satisfied that action under this section is desirable, it may issue such directions to the industrial undertaking concerned as may be appropriate in the circumstances for all or any of the following purposes, namely—

(a) regulating the production of any article or class of articles by the industrial undertaking and fixing the standards of production ;

(b) requiring the industrial undertaking or undertakings to take such steps as the Central Government may consider necessary to estimulate the development of the industry to which the undertaking or undertakings regulate or relate ;

(c) prohibiting the industrial undertaking or undertakings from resorting to any act or practice which might reduce its or their production, capacity or economic value ;

(d) controlling the prices, or regulating the distribution, of any article or class of articles which have been the subject matter of investigation.

(2) Where a case relating to any industry or industrial undertaking or undertakings is under investigation, the Central Government may issue at any time any direction of the nature referred to in sub-section (1) to the industrial undertaking or undertakings concerned, and any such direction shall have effect until it is varied or revoked by the Central Government.

1. *Dalip Singh* v. *Financial Commissioner*, AIR 1964 Punj 368.
2. AIR 1973 SC 389.

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The expression "relatable to any scheduled industry" cannot exclude the very article manufactured or produced by that industry.[1]

Section 18. Power of persons or body of persons appointed under Section 15 or Section 15-A to call for assistance in any investigation.—(1) The person or body of persons appointed to make any investigation under Section 15 or Section 15-A may choose one or more persons possessing special knowledge of any matter relating to the investigation to assist him or it in holding the investigation.

(2) The person or body of persons so appointed shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 for the purpose of taking evidence on oath (which he or it is hereby empowered to administer) and of enforcing the attendance of witnesses and compelling the production of documents and material objects, and the person or body of persons shall be deemed to be a Civil Court for all the purposes of Section 95 and Chapter XXXV of the Code of Criminal Procedure, 1898.

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1. (1969) 2 An WR 402.

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CHAPTER IV
DIRECT MANAGEMENT OR CONTROL OF INDUSTRIAL UNDERTAKINGS BY CENTRAL GOVERNMENT IN CERTAIN CASES

This chapter was added as Chapter III-A by an amendment of the Act in the year 1953.

Section 18-A. Power of Central Government to assume management or control of a Industrial Undertaking in certain cases.—(1) If the Central Government is of opinion that—

(a) an industrial undertaking to which directions have been issued in pursuance of Section 16 has failed to comply with such directions, or

(b) an industrial undertaking in respect of which an investigation has been made under Section 15 (whether or not any directions have been issued to the undertaking in pursuance of Section 16), is being managed in a manner highly detrimental to the scheduled industry concerned or to public interest, the Central Government may by notified order, authorise any person or body of persons to take over the management of the whole or any part of the undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order.

(2) Any notified order under sub-section (1) shall have effect for such period not exceeding five years as may be specified in the order :

Provided that if the Central Government is of opinion that it is expedient in the public interest that any such notified order should continue to have effect after the expiry of the period of five years aforesaid, it may from time to time issue direction for such continuance of such period, not exceeding two years at a time, as may be specified in the direction, so however, that the total period of such continuance (after the expiry of the said period of five years) does not exceed twelve years ; and where any such direction is issued, a copy thereof shall be laid, as soon as may be, before both Houses of Parliament.

Explanation.—The power to authorise a body of persons under this section to take over the management of an industrial undertaking which is a company includes also a power to appoint any individual, firm or company to be the managing agent of the industrial undertaking on such terms and conditions as the Central Government may think fit.

The effect of an order issued under Section 18-A is that the management and control is completely taken away from the directions and substantially from shareholders and the effective management and control of the Central Government through the authorised controller is substituted.[1]

For taking over the management of an industrial undertaking a notified order under Section 18-A by the Central Government is necessary. Section 2 of the Act only provides that it is expedient that the Union should take under its control the industries. But that section does not clothe the Union with control of the industries.[2]

1. *D.P. Kelkar* v. *Ambadas*. AIR 1971 Bom 124.
2. In re *Oriental Gas Company*. AIR 1961 Cal 267.

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In *Dalip Singh* v. *Finance Commissioner*,[1] it was held that on the principle of natural justice, the satisfaction of the Central Government before it comes to its conclusion with regard to the action proposed under Section 18-A is objective in nature and on this construction it cannot be denied that the company has to be given an opportunity before such action is taken against it. Therefore, an order passed by the Central Government to take over the management of a company without giving an opportunity to the company or its representative to show cause against the action, is illegal as violative of the principles of natural justice.

In *Ambalal* v. *Hathising Manufacturing Co.*[2] it was held that the words "in respect of which an investigation has been made under Section 15" in Section 18-A(1)(b) are not cut down by the restrictive phrase based on an opinion that the industrial undertaking is being managed in a manner highly determined to the scheduled industry concerned or to public interest". It cannot, therefore, be contended that action can be taken by the Central Government under Section 18-A(1)(b), only where the investigation made under Section 15 was initiated on the basis of the opinion as mentioned in Section 15(b). Moreover, any investigation on the basis of Section 15(1) would necessarily cover also the quality of the management of the industrial undertaking.

In *K.P. Khetan* v. *Union of India*,[3] certain functions of control were vested in the authorised Controller by an order of the Government of India with effect from December 18, 1952 issued under Section 3(4) of the Essential Supplies (Temporary Powers) Act, but the managment of the whole undertaking was not taken over. That continued till an investigation was ordered on July 30, 1953 under Section 15 of this Act. On November 14, 1953, the Controller was directed to take over the management of the whole of the industrial undertaking. Later on that order was cancelled on May 21, 1954 and a second investigation was ordered. It was followed by an order made on 8.11.1955 under Section 18-A of this Act. It was contended that in the circumstances it was rationally and logically impossible for the Central Government to be of opinion that the industrial undertaking was being managed in a manner highly detrimental to the public interest making the order of 9.11.1955 because the authorised Controller himself was in charge of the undertaking from December 18, 1952, till November 8, 1955 when the impugned order was made with a small break of less than two months only between the two dates May 21, 1954, when all appointments under the Act were cancelled and July 16, 1954, when a fresh order under the Essential Supplies (Temporary Powers) Act, 1946 was made and even during this short period the case of the petitioners was that the authorised Controller continued in possession and therefore the order was not a valid one as one of the requirements for passing an order under Section 18-A was not present. It was held that this contention was unsustainable. The effect of the cancellation of the first order under Section 18-A of the Industries (Development and Regulation) Act was to vest the management of the undertaking again in its owner who in this case were the Directors and the Managing Agents who were quarrelling amongst themselves. On the affidavits filed by the parties it was clear that peace amongst the Directors or in the family of the Managing Agents had not been restored by the time the cancellation order was made on May 21, 1954 and that a suit which was pending was still going on. That was the position when the second order was made under the Essential Supplies (Temporary Powers) Act, 1946, on July 25, 1954 which was followed by a second investigation under Section 15 of the Industries (Development and Regulation) Act in September, 1954. The petitioner was pursuing what he conceived to be his legal remedies by a writ application against the order of 16.7.1954 when the Central

1. AIR 1964 Punj 368.
2. AIR 1962 SC 588.
3. AIR 1957 SC 676.

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Government passed the order dated 8.11.1955. In these circumstances, therefore, it was idle to contend that Central Government has no materials before it for arriving at the opinion that the industrial undertaking was being managed in a manner highly detrimental to public interest and therefore one of the essential requirements of clause (b) of sub-section (1) of Section 18-A of the Industries (Development and Regulation) Act was not fulfilled before the order dated November 8, 1955, was made.[1]

It was further held that there is a real distinction between exercising certain functions of control, however drastic they may be, and taking over of the management of the whole of an undertaking on an order under Section 18-A of this Act. Sub-section (4) of Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, authorised the Controller to exercise, with respect to the whole or any part of the undertaking, such functions of control as may be specified in the order. It is not difficult to conceive that in a particular industrial undertaking the mere giving of some function of control may not be enough to meet the situation which has arisen and it may be necessary for the Central Government to pass an order taking over the management of the whole of the undertaking.[2]

An order under Section 18-A of this Act can be made on fulfilment of the following conditions :

(1) the industrial undertaking must be one in respect of which an investigation has been made under Section 15 of the Act ;

(2). the undertaking is being managed in a manner highly detrimental to the industry concerned or to public interest.

If Sections 15, 16 and 18-A, are read together, as they must be read, then it becomes at once clear that the condition as to the management of the industrial undertaking in a manner highly detrimental to the scheduled industry concerned or to public interest relates in its true scope and effect to period when the management of the industrial undertaking is in the hands of its owner ; that is, to a period before the management of the whole or any part of the undertaking is taken over. Similarly, with regard to the exercise of functions of control, which also is contemplated by Section 18-A of the Act, the condition again relates to a period before the functions of control are taken over. It would be illogical and against the terms of Sections 15, 16 and 18-A of the Act to hold that the conditions as to mismanagement can apply after the management has been taken over and during the period of its management by the authorised Controller. The argument, that whenever an amendment is made the test of mismanagement must again be fulfilled, will when pushed to its logical extremity result in an absurdity and no amendment will ever be possible because if after the management is taken over, the authorised controller becomes seriously ill or dies in a few days when the period of the order has not expired and the Central Government, finds it necessary to appoint another person and for that purpose make an amendment, no amendment could be made unless the test of mismanagement is again fulfilled. But such a test cannot be fulfilled when the management was in the hands of the authorised Controller till he died, the authorised Controller being more or less in the position of an agent of the Central Government.[3]

Similarly the contention that if an investigation under Section 15 of the Act had once been made and if at some previous stage the industrial undertaking was mismanaged, the two conditions continues to operate irrespective of whether the undertaking vests in the owner again for a time, and an amendment may be made at any time and even a fresh order can be made without the necessity of a fresh

1. *K.P. Khetan* v. *Union of India*, AIR 1957 SC 676.
2. *Ibid.*
3. *Ibid.*

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investigation and a fresh mismanagement must also be rejected as an extreme view. If, the management is once taken over by an order under Section 18-A but the order is later cancelled and the management again vests in the owner, the two conditions must be fulfilled again before an order under clause (b) of sub-section (1) of Section 18-A of the Act can be made. When those conditions are satisfied at the time of passing the second order and those conditions continued to exist when that order was amended because the management had not since the second order vested in the owner again there is no necessity for an investigation being made prior to making the amendment.[1]

The selection of a suitable person to be the authorised Controller rests with the Central Government and it may be presumed that the Central Government knows best the needs of the particular industry and of its own subjects and the suitability of the person to be appointed as authorised Controller. The test to be applied in cases where lack of good faith in the Central Government is pleaded, is not whether a better or more independent man was or might be available, nor is it the duty of the Court to subject the selection made by the Central Government to another and independent test of propriety and suitability, for the Court has really no materials for such a test. The test to be applied is whether the appointment was made for some ulterior purpose, some purpose other than the object for which the law, under which the impugned order is made, was enacted.[2]

In *Keshava Mills Co.* v. *Union of India*,[3] the company established in 1934 made flourishing business between the years 1935 and 1965 but the years thereafter witnessed a sudden reversal of the fortunes of the company and the Mill was one of the twelve sick mills of Gujarat which has to be closed down during 1966 and 1968. On May 31, 1969 the Government of India appointed a committee for investigating into the affairs of the company under Section 15 of this Act. The committee submitted its report sometimes in January 1970. The Government of India appointed Controller on November 24, 1970. The appellant company challenged the validity of the order dated 24 November, 1970 passed under Section 18-A of this Act by which the Gujarat State Textile Corporation Ltd. has been appointed the authorised Controller of the company for a period of five years. The report of the investigating committee was not given to the company. It was held that :

(1) It is not possible to lay down any general principle on the question as to whether the report of an investigating body or of an Inspector appointed by an administrative authority should be made available to the persons concerned in any given case before the authority takes a decision upon that report. The answer to this question also must always depend on the facts and circumstances of the case. In the circumstances of the case the non-disclosure of the report of the Investigating Committee did not cause any prejudice whatsoever to the textile mill company of the persons concerned.

(2) When a textile mill company and the persons concerned have received a fair treatment and also all reasonable opportunities to make out their own case before Government they cannot be allowed to make any grievances of the fact that they were not given a formal notice calling upon them to show cause why their undertaking should not be taken over or that they had not been furnished with a copy of the report, more so when Government gave them ample opportunity to reopen and run the mill on their own if they wanted to avoid the take-over. In absence of any resources with them to do

1. *K.P. Khetan* v. *Union of India*, AIR 1957 SC 676.
2. Ibid.
3. AIR 1973 SC 389.

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so, insistence on a formal hearing in such circumstances is nothing but insistence on an empty formality.

Section 18-AA. Power to take over industrial undertaking without investigation under certain circumstances.—(1) Without prejudice to any other provisions of this Act, if from the document or other evidence in its possession, the Central Government is satisfied, in relation to an industrial undertaking that,—

(a) the persons incharge of such industrial undertaking have, by reckless investment or creation of encumbrances on the assets of the industrial undertaking, or by division of funds, brought about a situation which is likely to affect the production of articles manufactured or produced in the industrial undertaking and that immediate action is necessary to prevent such a situation ; or

(b) it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the company owning the industrial undertaking or for any other reason) and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the company owning the industrial undertaking and the condition of the plant and machinery of such undertaking are such that it is possible to restart the undertaking and such re-starting is necessary in the interest of the general public,

it may, by a notified order, authorise any person or body of persons (hereafter referred to as the "authorised person") to take over the management of the whole or any part of the industrial undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order.

(2) The provisions of sub-section (1) of Section 18-A shall, as far as may be, apply to a notified order made under sub-section (1) as they apply to a notified order under sub-section (1) of Section 18-A.

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to an industrial undertaking owned by a company which is being wound up by or under the supervision of the court.

(4) Where any notified order has been made under sub-section (1), the person or body of persons having, for the time being, charge of the management or control of the industrial undertaking whether by or under the orders of any court or any contract, instrument or other arrangement, forthwith make over the charge of management or control, as the case may be, of the industrial undertaking to the authorised person.

(5) The provisions of Sections 18-B to 18-E (both inclusive) shall, as far as may be, apply to, or in relation to the industrial undertaking, in respect of which a notified order has been made under sub-section (1), as they apply to an industrial undertaking in relation to which a notified order has been issued under Section 18-A.

It was held in *Janki Sugar Mills* v. *Union of India*,[1] that an action under this section can be taken without complying with the proceedings of Section 15 of the Act. Consequently where an authorised Controller is appointed in pursuance of an action under Section 18-A, no opportunity to meet the grounds on which the authorised Controller is appointed is necessary to be given to the management. The proposition is supported by the facts that the word "without" is used in the marginal note which indicates that the Legislature did not intend any inquiry to be made before the appointment of authorised Controller was to be made. The "Statement of Object and Reasons" also supports this view. The language of the section also leads to the conclusion that it is not intended that any inquiry should be made before proposed

1. AIR 1976 All 99.

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taking over of a factory. This section requires action with promptitude. It is, therefore, impossible to imply a term that the rules of natural justice had to be observed. These principles do not apply to an action under this section.

In *Radha Ram Badrinath* v. *Amritsar Sugar Mills*,[1] Amritsar Sugar Mills Company Limited was an industrial undertaking registered under the Companies Act with its registered office at Amritsar and having a sugar factory in Rohana (U.P.) and a Vanaspati ghee factory in Amritsar. On January 10, 1974, the management of the sugar factory was taken over by the U.S. State Government under Rule 115(2) of the Defence and Internal Security of India Rules, 1971. The management of the Vanaspati ghee factory was taken over during the pendency of winding up proceedings by the body of persons appointed by the Central Government under Section 18-AA (1) of the Industries (Development and Regulation) Act, 1951. In this case the question was whether the proceedings for winding up of the company could be commenced without the consent of the Central Government required under clause (c) of sub-section (1) of Section 18-E of the Industries Act if the management of a part of the undertaking has been taken over by the Central Government under Section 18-AA (1) of the Industries Act. It was held that the consent of the Central Government under Section 18-E was not a pre-condition for commencement or continuance of winding up proceedings of the company where the management of a part of it has been taken over by the Central Government under Section 18-AA (1) of the Industries Act. The mere fact the liquidation proceedings had been initiated before the order under Section 18-AA(1) was passed would not by itself make any difference to the application of Section 18-E(1)(c) as the expression "no proceeding shall lie" used in that clause includes the initiating as well as the continuing of the relevant proceedings.

Section 18-B. Effect of notified order under Section 18-A.—(1) on the issue of a notified order under Section 18-A authorising the taking over of the management of an industrial undertaking—

(a) all persons in charge of the management, including persons holding office as managers or directors of the industrial undertaking immediately before the issue of the notified order, shall be deemed to have vacated their office as such ;

(b) any contract or management between the industrial undertaking and any managing agent or any director thereof holding office as such immediately before the issue of the notified order shall be deemed to have been terminated ;

(c) the managing agent, if any, appointed under Section 15-A, shall be deemed to have been duly appointed as the managing agent in pursuance of the Indian Companies Act, 1913 and the memorandum and articles of association of the industrial undertaking, and the provisions of the said Act and of the memorandum and articles shall, subject to the other provisions contained in this Act, apply accordingly, but no such managing agent shall be removed from office except with the previous consent of the Central Government ;

(d) the person or body of persons authorised under Section 18-A to take over the management shall take all such steps as may be necessary to take into his or their custody or control all the property, effects and actionable claims to which the industrial undertaking is or appears to be entitled and all the property and effects of the industrial undertaking shall be deemed to be in the custody of the person or, as the case may be, the body of persons from

1. AIR 1978 P & H 139.

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the date of the notified order ; and

(e) the person, if any, authorised under Section 18-A to take over the management of an industrial undertaking which is a company shall be for all purposes the directors of industrial undertaking duly constituted under the Indian Companies Act, 1913, and shall alone be entitled to exercise all the powers of the directors of the industrial undertaking, whether such powers are derived from the said Act or from the memorandum of articles of association of the industrial undertaking or from any other source.

(2) Subject to the other provisions contained in this Act and to the control of the Central Government, the person or body of persons authorised to take over the mangement of an industrial undertaking, shall take such steps as may be necessary for the purpose of efficiently managing the business of the industrial undertaking and shall exercise such other powers and have such other duties as may be prescribed.

(3) Where any person or body of persons has been authorised to exercise any functions of control in relation to an industrial undertaking, the undertaking shall be carried in pursuant to any directions given by the authorised person in accordance with the provisions of the notified order and any person having any function of managemnt in relation to the undertaking or part thereof shall comply with all such directions.

(4) The person or body of persons authorised under Section 18-A shall notwithstanding anything contained in the memorandum or articles of association of the industrial undertaking exercise his or their functions in accordance with such directions as may be given by the Central Government so, however, that he or they shall not have any power to give to any other person any direction under this section inconsistent with the provisions of any Act or instrument determining the functions of the authority carrying on the undertaking except in so far as may be specifically provided by the notified order.

Section 18-C. Contracts in bad faith, etc., may be cancelled or varied.—Without prejudice to the provisions contained in Section 18-B, the person or body of persons authorised under Section 18-A to take over the management of an industrial undertaking may, with the previous approval of the Central Government, make an application to any court having jurisdiction in this behalf for the purpose of cancelling or varying any contract or agreement entered into at any time before the issue of the notified order under Section 18-A, between the industrial undertaking and any other person and the court may, if satisfied after due inquiry that such contract or agreement had been entered into in bad faith and is detrimental to the interests of the industrial undertaking, make an order cancelling or varying (either unconditionally or subject to such conditions as it may think fit to impose) that the contract or agreement shall have effect accordingly.

In *Pradip Lamp Works* v. *Pratap Chandra Basu*[1] it was held that a proceeding under Section 18-C of this Act is a proceeding which a person or body of persons authorised under Section 18-A of the Act alone can institute. And when the said person or body of persons becomes or become *functus officio* the proceeding already launched must abate.

Section 18-D. No right to compensation for termination of office or contract.—Notwithstanding anything contained in any law for the time being in force, no person who ceases to hold any office by reason of the provisions contained in clause (a) of Section 18-B, or whose contract of management is terminated by reason of the provisions contained in clause (b) of that section, shall be entitled to any compensation for the loss of office or for the premature termination of the contract of management :

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1. AIR 1972 Cal 301.

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Provided that nothing contained in this section shall affect the right of any such person to recover from the industrial undertaking money recoverable otherwise than by way of such compensation.

Section 18-E. Application of Act 7 of 1913.—(1) Where the management of an industrial undertaking being a company as defined in the Indian Companies Act, 1913, is taken over by the Central Government, then notwithstanding anything contained in the said Act, or in memorandum or articles of association of such undertaking—

(a) it shall not be lawful for the shareholders of such undertaking or any other person to nominate or appoint any person to be a director of the undertaking ;

(b) no resolution passed at any meeting of the shareholders of such undertaking shall be given effect to unless approved by the Central Government ;

(c) no proceeding for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any court except with the consent of the Central Government.

(2) Subject to the provisions contained in sub-section (1) and to the other provisions contained in this Act and subject to such other exceptions, restrictions and limitations, if any, as the Central Government may, by notification in the official Gazette, specify in this behalf, the Indian Companies Act, 1913 shall continue to apply to such undertaking in the same manner as it applied thereto before the issue of the notified order under Section 18-A.

The expression "no proceeding.....shall lie" under clause (c) of Section 18-E(1) refers to any and every proceeding connected with the winding up. The word 'lie' is of sufficient amplitude to include not only the filing of a petition for the winding up of a company but also its maintainability after the Central Government takes over its management. Section 18-E(1)(c) on its own terms is clearly retrospective in effect and the winding up petition having been filed already is of no avail.[1]

In re *India Electric Works*,[2] is another decision on this section. In this case the management of the company was taken over by the Central Government by passing an order under Section 18-A of this Act. The Government of India appointed the petitioner, State Bank of India the bankers of the company. As the company had been incurring heavy losses year after year the petitioner applied for winding up of the company. Some creditors supported and some opposed the petition for winding up. A dispute was raised by the creditors and shareholders regarding the validity of sanction given by the Central Government under the section. It was held that the shareholders or creditors of such company are not entitled to challenge the validity of liquidation proceeding on the ground of validity of the sanction as the section does not give any right to them.

Section 18-F. Power of Central Government to cancel notified order under Section 18-A.—If at any time it appears to the Central Government on the application of the owner of the industrial undertaking or otherwise that the purpose of the order made under Section 18-A has been fulfilled or that for any other reason it is not necessary that the order should remain in force, the Central Government may, by notified order, cancel such order and on the cancellation of any such order the management or the control, as the case may be, of the industrial undertaking shall vest in the owner of the undertaking.

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1. (1968) 38 Com Cases 533.
2. AIR 1970 Cal 308.

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CHAPTER V
MANAGEMENT OR CONTROL OF INDUSTRIAL UNDERTAKINGS OWNED BY COMPANIES IN LIQUIDATION

This chapter was added as Chapter III-AA by an amendment of the Act in year 1971.

Section 18-FA. Power of Central Government to authorise, with permission of the High Court persons to take over management or control of industrial undertakings.—(1) If the Central Government is of opinion that there are possibilities of running or restarting an industrial undertaking, in relation to which an investigation has been made under Section 15-A, and that such industrial undertaking should be run or re-started, as the case may be, for maintaining or increasing the production, supply or distribution of articles or, class of articles relatable to the scheduled industry, needed by the general public that Government may make an application to the High Court praying for permission to appoint any person or body of persons to take over the management of the industrial undertaking or to exercise in respect of the whole or any part of the industrial undertaking such function of control as may be specified in the application.

(2) Where an application is made under sub-section (1), the High Court shall make an order empowering the Central Government to authorise any person or body of person (hereinafter referred to as the 'authorised persons') to take over the management of the industrial undertaking or to exercise functions of control in relation to the whole or any part of the industrial undertaking (hereinafter referred to as the 'concerned part') for a period not exceeding five years :

Provided that if the Central Government is of opinion that it is expedient in the interest of the general public that the authorised person should continue to manage the industrial undertaking, or continue to exercise functions of control in relation to the concerned part, as the case may be, after the expiry of the period of five years aforesaid, it may make an application to the High Court for the continuance of such management of functions of control, for such period, not exceeding two years at a time, as may be specified in the application and thereupon the High Court may make an order permitting the authorised person to continue to manage the industrial undertaking or to exercise functions of control in relation to the concerned part :

Provided further that the total period of such continuance after the expiry of the initial period of five years shall not, in any case, be permitted to exceed twelve years.

(3) Where an order has been made by the High Court under sub-section (2), the High Court shall direct the Official Liquidator or any other person having, for the time being charge of the management or control of the industrial undertaking, whether by or under the orders of any court, or any contract or instrument or otherwise to make over the management of such undertaking or the concerned part, as the case may be, to the authorised person and thereupon the authorised person shall be deemed to be Official Liquidator in respect of the industrial undertaking or the concerned part, as the case may be.

(4) Before making over the possession of the industrial undertaking or the

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concerned part to the authorised person, the Official Liquidator shall make a complete inventory of all the assets and liabilities of the industrial undertaking or the concerned part, as the case may be, in the manner specified in Section 18-FG and deliver a copy of such inventory to the authorised person, who shall, after verifying the correctness thereof, sign on the duplicate copy thereof as evidence of the receipt of the inventory by him.

(5) On taking over the management of the 'industrial undertaking' or on the commencement of the exercise of functions of control in relation to the concerned part, the authorised person shall take immediate steps to so run the industrial undertaking or the concerned part as to ensure the maintenance of production.

(6) The authorised person may, on such terms and conditions and subject to such limitations or restrictions as may be prescribed, raise any loan for the purpose, create a floating charge on the current assets of the industrial undertaking or the concerned part as the case may be.

(7) Where the authorised person is of opinion that the replacement or repair of any machinery of the industrial undertaking or the concerned part is necessary for the purpose of efficient running of the industrial undertaking or such part he shall, on such terms and conditions and subject to such limitations or restrictions as may be prescribed, make such replacement or repair, as the case may be.

(8) The loan obtained by the authorised person shall be recovered from the assets of the industrial undertaking or the concerned part, in such manner and subject to such conditions as may be prescribed.

(9) For the purpose of running the industrial undertaking, or exercising functions of control in relation to the concerned part, the authorised person may employ such of the former employees of the industrial undertaking whose services became discharged by reason of the winding up of the company owning such undertaking and every such person employed by the authorised person shall be deemed to have entered into a fresh contract of service with the company.

(10) The proceedings in the winding up of the company in so far as they relate to—

(a) the industrial undertaking the management of which has been taken over by the authorised person under this section, or

(b) the concerned part in relation to which any function of control is exercised by the authorised person under this section,

shall during the period of such management or control, remain stayed, and in computing the period of limitation for the enforcement of any right, privilege, obligation or liability in relation to such undertaking or the concerned part, the period during which such proceedings remained stayed shall be excluded.

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CHAPTER VI
POWER TO PROVIDE RELIEF TO CERTAIN INDUSTRIAL UNDERTAKINGS

This chapter was added as Chapter III-AB of the Act by an amendment in the year 1971.

Section 18-FB. Power of Central Government to make certain declaration in relation to industrial undertakings, the management or control of which has been taken over under Section 18-A, Section 18-AA or Section 18-FA.—(1) The Central Government may, if it is satisfied, in relation to an industrial undertaking or any part thereof, the management or control of which has been taken over under Section 18-A whether before or after the commencement of the Industrial (Development and Regulation) Amendment Act, 1971, or under Section 18-AA or Section 18-FA, that it is necessary so to do in the interests of the general public with a view to preventing fall in the volume or production of any scheduled industry, it may, by notified order, declare that—

(a) all or any of the enactments specified in the Third Schedule shall not apply or shall apply with such adaptations, whether by way of modification, addition or omission (which does not however, affect the policy of the said enactments) to such industrial undertaking, as may be specified in such notified order, or

(b) the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force (to which such industrial undertaking or the company owning such undertaking is party or which may be applicable to such industrial undertaking or company) immediately before the date of issue of such notified order shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified in the notified order.

(2) The notified order made under sub-section (1) shall remain in force, in the first instance, for a period of one year but the duration of such notified order may be extended from time to time by a further notified order by a period not exceeding one year at a time :

Provided that no such notified order shall, in any case, remain in force—

(a) after the expiry of the period for which the management of the industrial undertaking was taken over under Section 18-A, Section 18-AA or Section 18-FA, or

(b) for more than five years in the aggregate from the date of issue of the first notified order,

whichever is earlier.

(3) Any notified order made under sub-section (1) shall have effect notwithstanding anything to the contrary contained in any other law, agreement or instrument or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order.

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(4) Any remedy for the enforcement of any right, privilege, objection or liability referred to in clause (b) sub-section (1) and suspended or modified by a notified order, made under that sub-section, shall in accordance with the terms of notified order remain suspended or modified, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall accordingly remain stayed or be continued subject to such adaptations, so however, that on the notified order ceasing to have effect—

(a) any right, privilege, obligation or liability so remaining, suspended or modified shall become revived and enforceable as if the notified order had never been made ;

(b) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1), the period during which it or the remedy for the enforcement thereof remained suspended shall be excluded.

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CHAPTER VII
LIQUIDATION OR RECONSTRUCTION OF COMPANIES

This chapter was added as Chapter III-AC by an amendment of the Act in the year 1971.

Section 18-FC. Power of Central Government to call for report on the affairs and working of managed company.—Where the management or control of an industrial undertaking has been taken over under Section 18-A, whether before or after the commencement of the Industrial (Development and Regulation) Amendment Act, 1971, or under Section 18-AA or Section 18-FA, the Central Government may, at any time during the continuance of such management or control, call for a report from the authorised person on the affairs and working of the industrial undertaking and in submitting the report the authorised person shall take into account the inventory and the lists of members and creditors prepared under Section 18-FG.

Section 18-FD. Power of Central Government in relation to managed company.—(1) If, on receipt of the report submitted by the authorised person, the Central Government is satisfied—

(a) in relation to the company owning the industrial undertaking, which is not being wound up by the High Court that the financial conditions and other circumstances of the company are such that it is not in a position to meet its current liabilities out of its current assets, that Government may, if it considers necessary or expedient in the interests of the general public so to do, by order, decide that industrial undertaking should be sold as a running concern as provided in Section 18-FE and proceedings should simultaneously be started for the winding up, by the High Court, of the company ;

(b) in relation to the company. owning the industrial undertaking, which is being wound up by the High Court, that its assets and liabilities are such that in the interests of its creditors and contributors the industrial undertaking should be sold as a running concern as provided in Section 18-FE, it may, by order, decide accordingly.

(2) Notwithstanding anything contained in sub-section (1) if, on receipt of the report submitted by the authorised person, the Central Government is satisfied that—

(a) in the interests of the general public, or

(b) in the interests of the share-holders, or

(c) to secure the proper management of the company owning the industrial undertaking,

it is necessary so to do Government may, by order, decide to prepare a scheme for the reconstruction of the company owning the industrial undertaking :

Provided that no such scheme shall be prepared in relation to a company which is being wound up by or under the supervision of the High Court, except with the previous permission of that Court.

(3) The powers exercisable by the Central Government under Section 18-F in relation to an undertaking taken over under Section 18-A, shall also be exercisable in relation to an undertaking taken over under Section 18-AA or Section 18-FA, but such powers shall not be exercised after the making of an order under sub-section (1), or as

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the case may be, under sub-section (2) of this section.

Section 18-FE. Provision where Government decides to follow the course of action specified in Section 18-FD.—(1) The provisions hereinafter laid down shall apply where the Central Government decides that the course of action specified in sub-section (1) of Section 18-FD should be followed, namely—

(a) the decision of the Central Government that the course of action specified in clause (a) of sub-section (1) of Section 18-FD should be followed in relation to a company owning an industrial undertaking shall be deemed to be a ground specified in Section 433 of the Companies Act, 1956, on which the company may be wound up by the High Court ;

(b) the authorised person shall, as soon as may be, after the decision specified in clause a of sub-section (1) of Section 18-FD has been taken by the Central Government, present an application to the High Court for the winding up of the company owning the industrial undertaking ;

(c) when an application is made by the authorised person, under clause (b), for the winding up, by the High Court, of the company owning the industrial undertaking, the High Court shall order the winding up of the company and shall notwithstanding anything contained in the Companies Act, 1956 appoint the authorised person as the Official Liquidator in relation to such undertaking ;

(d) whenever the Central Government decides under clause (b) of sub-section (1) of Section 18-FD that the industrial undertaking should be sold as a running concern, it shall cause a copy of its decision to be laid before the High Court ;

(e) until the industrial undertaking referred to in clause (a) or clause (b) of sub-section (1) of Section 18-FD is sold or purchased in pursuance of this section, the authorised person shall continue to function as the Official Liquidator in relation to the said undertaking in the winding up proceedings of the company, and thereafter, the Official Liquidator appointed by the Central Government under Section 488 of the Companies Act, 1956 shall take over and function as the Official Liquidator in the said proceedings.

(2) The authorised person shall make a report to the Central Government as to what should be the reserve price for the sale of the industrial undertaking as a running concern.

(3) In making a report under sub-sectin (2), the authorised person shall have regard to—

(a) the financial condition of the company owning the industrial undertaking on the date on which the order under Section 18-FD is made—

(i) as disclosed in its books of account ;

(ii) as disclosed in its balance-sheet and profit and loss account during a period of five years immediately preceding the said date ;

(b) the condition and nature of the plant, machinery, instruments and other equipment from the point of view of their suitability for profitable use in the running of the industrial undertaking ;

(c) the total amount of liability on account of secured and unsecured debts including overdrafts, if any, drawn on banks, liabilities on account of terminal benefits to the employees and other borrowings and other liabilities of the company ; and

(d) other relevant factors including the factor that the industrial undertaking will be sold free from all encumbrances.

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(4) Notice of the reserve price determined by the authorised person shall be given in such manner as may be prescribed to the members and creditors of the company owning such industrial undertaking to make representations within a specified time to the Central Government through the authorised person and the Central Government shall, after considering the representations received and the report of the authorised person, determine the reserve price.

(5) The authorised person, shall, therefore, with the permission of the High Court, invite tenders from the public in such manner as may be determined by the High Court for the sale of the industrial undertaking as a running concern subject to the condition that it will be sold to the person offering the highest price which shall not be less than the reserve price determined under sub-section (4) :

Provided that the High Court shall not refuse to grant such permission if it is satisfied that the company is not in a position to meet its current liabilities out of its current assets.

(6) The industrial undertaking shall be sold to the highest bidder as a running concern, only if the price offered by him therefor is not less than the reserve price.

(7) Where no offer of price is equal to, or more than, the reserve price, the industrial undertaking shall be purchased by the Central Government at the reserve price.

(8)(a) The amount realised from the sale of the industrial undertaking as a running concern together with any other sum which may be realised from any contributory, purchaser or any other person from whom any money is due to the company shall be utilised in accordance with the provisions of the Companies Act,1956 in discharging liabilities of the company and distributing the balance, if any, amongst the members of the company.

(b) In other respects, the provisions of the Companies Act, 1956 relating to the winding up of a company by the High Court shall, as far as may be, apply.

(9) When an industrial undertaking is sold to any person under sub-section (6) or purchased by the Central Government under sub-section (7), there shall be transferred to and vested in the purchaser, free from all encumbrances, all such assets relating to the industrial undertaking as are referred to in sub-clause (i) of clause (a) of Section 18-FG and existing at the time of sale or purchase.

Section 18-FF. Provisions where Government decides to follow the course of action specified in Section 18-FD(2).—(1) Where in any case the Central Government decides that the course of action specified in sub-section (2) of Section 18-FD shall be followed, it should, subject to the provisions of that sub-section, cause to be prepared, by the authorised person a scheme for the reconstruction of the company, owning the industrial undertaking, in accordance with the provision hereinafter contained and the authorised person shall submit the same for the approval of that Government.

(2) The scheme for the reconstruction of the company owning the industrial undertaking may contain provisions for all or any of the following matters, namely—

(a) the constitution, name and registered office, the capital assets, powers, rights, interest, authorities and privileges, the liabilities, duties and obligations of the company on its reconstruction ;

(b) any change in the Board of Directors, of the appointment of a new Board of Directors of the company on its reconstruction and authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made in the case of appointment of a new Board of Directors or of any Director, the period for which such

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appointment shall be made ;

(c) the investing of controlling interest, in the reconstructed company, in the Central Government either by the appointment of additional directors or by the allotment of additional shares ;

(d) the alteration of the memorandum and articles of association of the company, on its reconstriction, to give effect to such reconstruction ;

(e) subject to the provisions of the scheme, the continuation by or against the company, on its reconstruction, of any action or proceeding pending against the company immediately before the date of its reconstruction ;

(f) the reduction of the interest or rights which the members and creditors have in or against the company before its reconstruction to such extent as the Central Government may consider necessary in the interests of the general public, or in the interests of the members and creditors or for the maintenance of the business of the company :

Provided that nothing contained in the clause shall be deemed to authorise the reduction of the interest or rights of any creditor (including Government) in respect of any loan or advance made by that creditor to the company after the date on which the management of the industrial undertaking of the company has been taken over under Section 18-A, Section 18-AA or Section 18-FA ;

(g) the payment in cash or otherwise to the creditors in full satisfaction of their claim—

(i) in respect of their interest or rights in or against the company before its reconstruction ; or

(ii) where their interest or rights in or against the company has or have been reduced under clause (1), in respect of such interest or rights as so reduced ;

(h) the allotment to the members of the company for shares held by them therein before its reconstruction [whether their interest in such shares has been reduced under clause (f) or not], of shares in the company on its reconstruction and where it is not possible to allot shares to any members, the payment in cash to those members in full satisfaction of their claim—

(i) in respect of their interest in shares in the company before its reconstruction, or

(ii) where such interests has been reduced under clause (f) in respect of their interest in share as so reduced,

(i) the offer by the Central Government to acquire by negotiations with the members of the company their respective shares on payment in cash to those members who may volunteer to sell their shares to the Central Government in full satisfaction of their claim—

(i) in respect of their interest in shares in the company before its reconstruction, or

(ii) where such interest has been reduced under clause (f) in respect of their interest in shares as so deduced ;

(j) the conversion of any debentures issued by the company, after the taking over of the management of company, under Section 18-A or Section 18-AA or Section 18-FA or of any loans obtained by the company after that date or of any part of such debentures or loans, into shares, in the company and the allotment of those shares to such debenture-holders or creditors, as the case may be ;

(k) the increase of the capital of the company by the issue of new shares and

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the allotment of such new shares to the Central Government ;

(l) the continuance of the services of such of the employees of the company as the Central Government may specify in the scheme in the company itself, on its reconstruction, on such terms and conditions as the Central Government thinks fit ;

(m) notwithstanding anything contained in clause (1), where any employees of the company whose services have been continued under clause (1) have, by notice in writing given to the company at any time before the expiry of one month next following the date on which the scheme is sanctioned by the High Court, intimated their intention of not becoming employees of the company and to other employees whose services have not been continued on the reconstruction of the company, of compensation, if any, to which they are entitled under the Industrial Disputes Act, 1947 and such pension, gratuity, provident fund and other retirement benefits ordinarily admissible to them under the rules or authorisations of the company immediately before the date of its reconstruction ;

(n) any other terms and conditions for the reconstructions of the company ;

(o) such incidental, consequent and supplemental matters as are necessary to secure that the reconstruction of the company shall be fully and effectively carried out.

(3)(a) A copy of the scheme, as approved by the Central Government shall be sent in draft to the company, to the registered trade unions, if any, of which the employees of the company are members and to the creditors thereof for suggestions and objections, if any, within such period as the Central Government may specify for this purpose.

(b) The Central Government may make any such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the company, from the registered trade unions of which the employees of the company are members and from any members or creditors of the company.

(4) The scheme shall thereafter be placed before the High Court for its sanction and the High Court, if satisfied that the scheme is in the interests of the general public or in the interests of the shareholders or for securing the proper management of the company and that the scheme is designed to be fair and reasonable to the members and creditors of the company may, after giving a reasonable opportunity to the company and to its members and creditors of showing cause, sanction the scheme without any modification or with such modification as it may consider necessary.

(5) The scheme, as so sanctioned by the High Court, shall come into force on such date as the Court may specify in this behalf :

Provided that different dates may be specified for different provisions of the scheme.

(6) The sanction accorded by the High Court under sub-section (4) shall be conclusive evidence that all the requirements of this section relating to the reconstruction of the company have been complied with, and a copy of the sanctioned scheme certified by the High Court to be a true copy thereof, shall in all legal proceedings (whether original or in appeal or otherwise), be admitted as evidence to the same extent as the original scheme.

(7) On and from the date of the coming into operation of the scheme or any provision thereof, scheme or such provision shall be binding on the company and also on all the members and other creditors and employees of the company and on any other person having any right or liability in relation to the company.

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(8) On the coming into operation of the scheme or any provision thereof, the authorised person shall cease to function, and the management of the reconstructed company shall be assumed by the Board of Directors as provided in the scheme.

(9) Copies of the scheme shall be laid before each House of Parliament. as soon as may be, after the scheme has been sanctioned by the Court.

(10) The provisions of this section and of any scheme made thereunder shall have effect notwithstanding anything contained in Sections 391 to 394-A (both inclusive) of the Companies Act, 1956.

Section 18-FG. Preparation of inventory of assets and liabilities and list of members and creditors of managed company.—For the purposes of this Act the authorised person shall, as soon as may be, after taking over the management of the industrial undertaking of a company under Section 18-A or Section 18-AA or Section 18-FA—

(a) prepare a complete inventory of—

(i) all properties, movable and immovable, including lands, buildings, works, workshops, stores, instruments, plant, machinery, automobiles and other vehicles, stocks of materials in the course of production, storage, or transit, raw materials, cash in balances, cash in hand, deposits in bank or with any other person or body or on loan reserve funds investments and books, debts and all other rights and interests arising out of such property as were immediately before the date of taking over of the industrial undertaking in the ownership, possession, power or control of the company, whether within or without India ; and all books of account, registers, maps, sections, drawings, records, documents or titles of ownership of property, and all other documents of whatever nature relating thereto ; and

(ii) all borrowings, liabilities, and obligations of whatever kind of the company including liabilities on account of the management of the industrial undertaking showing separately in the list of creditors, the secured creditors and the unsecured creditors :

Provided that where the management of the industrial undertaking of a company has been taken over under the said Section 18-A before the commencement of the Industrial (Development and Regulation) Amendment Act, 1971, the aforesaid functions shall be performed by the authorised person within six months from such commencement.

Section 18-FH. Stay of suits and other proceedings.—In the case of a company in respect of which an order under Section 18-FD has been made, no suit or other legal proceeding shall be instituted or continued against the company except with the previous permission of the Central Government or any officer or authority authorised by that Government in this behalf.

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CHAPTER VIII
CONTROL OF SUPPLY, DISTRIBUTION, PRICE, ETC. OF CERTAIN ARTICLES

Section 18-G. Power to control, supply, distribution, price, etc. of certain articles.—(1) The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair prices of any article or class of articles relatable to any scheduled industry, may, notwithstanding anything contained in any other provision of this Act by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), a notified order made thereunder may provide—

(a) for controlling the prices at which any such article or class thereof may be bought or sold ;

(b) for regulating by licences, permits or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any such article or class thereof ;

(c) for prohibiting the withholding from sale of any such article or class thereof ordinarily kept for sale ;

(d) for requiring any person manufacturing, producing or holding in stock any such article or class thereof to sell the whole or part of the articles so manufactured or produced during a specified period or to sell the whole or a part of the articles so held in stock to such person or class of persons and in such circumstances as may be specified in the order ;

(e) for regulating or prohibiting any class of commercial or financial transactions relating to such article or class thereof which in the opinion of the authority making the order are, or if unregulated are likely to be detrimental to public interest ;

(f) for requiring persons engaged in the distribution and trade and commerce in any such article or class thereof to make the articles exposed or intended for sale with the sale price or to exhibit at some easily accessible place on the premises the price lists of articles held for sale and also to similarly exhibit on the first day of every month, or at such other time as may be prescribed, a statement of the total quantities of any such articles in stock ;

(g) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters ; and

(h) for any industrial or supplementary matters, including, in particular, the grant or issue of licences, permits, or other documents and charging of fees therefor.

(3) Where in pursuance of any order made with reference to clause (d) of sub-section (2), any person sells any article, there shall be paid to him the price therefor—

(a) where the price can, consistently with the controlled price, if any, be fixed by agreement, the price so agreed upon ;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any, fixed under this section ;

(c) where neither clause (a) nor clause (b) applies, the price calculated at the

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market rate prevailing in the locality at the date of sale.

(4) No order made, in exercise of any power conferred by this section shall be called in quetion in any Court.

(5) Where an order purports to have been made and signed by an authority in exercise of any power conferred by this section, a Court shall within the meaning of the Indian Evidence Act, 1872 presume that such order was so made by the authority.

Explanation.—In this section, the expression "article or class of articles" relatable to any scheduled industry includes any article or class of articles imported into India which is of the same nature or description as the article or class of articles manufactured or produced in the scheduled industry.

In *Jaipur Udhyog* v. *Union of India*,[1] the petitioner was a limited company carrying on business in the manufacture of cement. In exercise of powers conferred by Section 18-G and Section 25 of this Act, the Central Government made the Cement Control Order, 1967 regulating the supply, distribution and trade and commerce in cement for securing its equitable distribution and availability at fair price. This order was challenged on many grounds. It was held that—

(a) the impugned order is neither outside the scope of Section 18-G, nor is based on extraneous considerations because it was made to ensure equitable distribution and availabiltiy of cement to consumers at a fair price throughout the country and also to build up export market for cement.

(b) power of the Central Government to prohibit removal of cement outside the precincts of the factory or outside the premises of the producer is implied in the general power conferred by Section 18-G of the Act and unless it were so conferred, it may be difficult to carry out the purpose and object of the Cement Control Order. Moreover in the absence of any instance it cannot be presumed that the Government will abuse its power in the matter of granting permission for removal of cement from the factory as and when it is sought on just and proper grounds. The permission for removal contemplated under this clause is only formal. This is only an incidental and supplementary provision and is not intended to operate as a restriction.

In *G.P. Shivaprakash* v. *Union of India*,[2] it was held that clause (b) of Section 18-G (2) enables the Government to impose restrictions or conditions on a manufacturer or a dealer or a consumer of any scheduled article. The concept of distribution or acquisition involves two parties—the distributor or supplier or vendor on one hand and the purchaser acquirer on the other. Thus the power of the Government to impose restrictions applies to manufacturer, dealer or consumer.

Articles referred to in Section 18-G are articles relatable to industry and not relatable to goods manufactured by that industry.[3] Restrictions imposed on distribution and supply of certain articles by an earlier order may be varied and modified by the Government in the exercise of powers conferred by this section.[4] Where the object of an order made under this section is to secure equitable distribution and availability at fair prices of certain articles, the order cannot be said to be *ultra vires* under Section 18-G.[5] So also an order regarding control of certain article will not be discriminatory simply because it is made applicable to one particular State and not to other States.[6]

1. AIR 1969 Raj 281.
2. AIR 1968 Mys 245.
3. (1969) 2 An WR 402.
4. (1969) Ker LJ 1125.
5. Ibid.
6. (1969) 2 An WR 402.

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CHAPTER IX
MISCELLANEOUS

Section 19. Powers of inspection.—(1) For the purpose of ascertaining the position of working of any industrial undertaking or for any other purpose mentioned in this Act or the rules made thereunder, any person authorised by the Central Government in this behalf shall have the right—

(a) to enter and inspect any premises ;

(b) to order the production of any document, book, register or record in the possession or powers of any person having the control of, or employed in connection with, any industrial undertaking ; and

(c) to examine any person having the control of, or employed in connection with, any industrial undertaking.

(2) Any person authorised by the Central Goverment under sub-section (1) shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860.

Section 20. General prohibition of taking over the management or control of industrial undertaking.—After the commencement of this Act, it shall not be competent for any State Government or a local authority to take over the management or control of any industrial undertaking under any law for the time being in force which authorises any such Government or local authority so to do.

The true meaning of Section 20 is that if any action is sought to be taken under the Act, it could not be held that by reason of Section 20, it was no longer competent to the State legislature to make any law or to take any action.[1]

In *National Sugar Mills* v. *State*,[2] the Government of West Bengal took over possession of assets of National Sugar Mills in pursuance to a mortgage deed. It was contended by the petitioner that the order of the Government taking over the possession of the assets of the Mill was in contravention of Section 20 of this Act and was, therefore, illegal. It was held that :

> "Section 20 of the Act applies only when management or control of any industrial undertaking is taken over by the State Government pursuant to any law for the time being in force which authorises the State Government to do so. In other words, if any particular provision of any statute authorises the State Government to take over management or control of any industrial undertaking and the State Government chooses to exercise such powers in pursuance of any such provisions, then the provisions of Section 20 are attracted. But Section 20 has no application to any case of taking over possession on the basis of any arrangement or agreement betwen the parties for Section 20 does not deal with any contractual right or obligations of the parties and it does not preclude the State Government from asserting right on the basis of any contract between the parties. Hence, when the State Government, as the mortgagee, takes over the possession of the mortgaged property, an industrial undertaking, on the basis of the provisions of the mortgage deed, for default by the mortgagor, then the provisions of Section

1. In re *Oriental Gas Co. Ltd.*, AIR 1961 Cal 267.
2. AIR 1967 Cal 609.

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20 of the Act will not be attracted and the action of the State Government is valid."

In *Calcutta Gas Company (Pvt.) Ltd.* v. *State of W.B.*[1] the validity of Section 20 of the Act was challenged on the ground that 'gas industry' is covered by Entry 24 of List II and as such any Parliamentary legislation in so far as it affects that Entry is void. It was held that the expression 'industry' in Entry 52 of List I bears the same meaning as that in Entry 24 of List II. The result is that 'industry' in Entry 52 of List I does not take in a gas industry. If so, it follows that the Industrial (Development and Regulation) Act, 1951 in so far as it purports to deal with the gas industry is beyond the legislative competence of Parliament. Section 20 is an integral part of the Act, and if it is taken out of the Act, it can only operate in vaccum. Therefore, if the Act is constitutionally void in so far as it purports to affect the gas industry, for the aforesaid reasons, Section 20 will equally be void to the same extent for the same reasons.

Section 21. Certain administrative expenses of Development Councils to be paid from money provided by Parliament.—Such administrative expenses as relate to the emoluments of officers of a Development Council who are appointed by or with the approval of the Central Government, shall be defrayed out of money provided by Parliament.

Section 22. Power of the Central Government to issue direction.—In the exercise of its functions under this Act, every Development Council shall be guided by such instructions as may be given to it by the Central Government and such instructions may include directions relating to the manner in which and the purpose for which any proceeds of the cess levied under Section 9 which may have been handed over to it, shall be extended.

Section 23. Decision of Central Government final respecting certain matter.—If, for the purposes of this Act, any question arises as to whether—

(a) there has been a substantial expansion of an industrial undertaking, or

(b) an industrial undertaking is producing or manufacturing any new article,

the decision of the Central Government thereon shall be final.

Section 24. Penalties.—(1) If any person contravenes or attempts to contravene or abets the contravention of—

(i) the provisions of sub-section (1) of Section 10, or of sub-section (1) or sub-section (4) of Section 11, or Section 11-A or of sub-section (1) of Section 13 or of sub-section (2), (2-A), (2-D), (2-E) and (2-G) of Section 29-B, or

(ii) any direction issued under Section 16 or sub-section (3) of Section 18-B, or

(iii) any order made under Section 18-G, or

(iv) any rule the contravention of which is made punishable under this section,

he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both, and, in the case of a continuing contravention, with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

(2) If the person contravening any of the said provisions is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly :

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1. AIR 1962 SC 1044.

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the date of the notified order ; and

(e) the person, if any, authorised under Section 18-A to take over the management of an industrial undertaking which is a company shall be for all purposes the directors of industrial undertaking duly constituted under the Indian Companies Act, 1913, and shall alone be entitled to exercise all the powers of the directors of the industrial undertaking, whether such powers are derived from the said Act or from the memorandum of articles of association of the industrial undertaking or from any other source.

(2) Subject to the other provisions contained in this Act and to the control of the Central Government, the person or body of persons authorised to take over the mangement of an industrial undertaking, shall take such steps as may be necessary for the purpose of efficiently managing the business of the industrial undertaking and shall exercise such other powers and have such other duties as may be prescribed.

(3) Where any person or body of persons has been authorised to exercise any functions of control in relation to an industrial undertaking, the undertaking shall be carried in pursuant to any directions given by the authorised person in accordance with the provisions of the notified order and any person having any function of managemnt in relation to the undertaking or part thereof shall comply with all such directions.

(4) The person or body of persons authorised under Section 18-A shall notwithstanding anything contained in the memorandum or articles of association of the industrial undertaking exercise his or their functions in accordance with such directions as may be given by the Central Government so, however, that he or they shall not have any power to give to any other person any direction under this section inconsistent with the provisions of any Act or instrument determining the functions of the authority carrying on the undertaking except in so far as may be specifically provided by the notified order.

Section 18-C. Contracts in bad faith, etc., may be cancelled or varied.—Without prejudice to the provisions contained in Section 18-B, the person or body of persons authorised under Section 18-A to take over the management of an industrial undertaking may, with the previous approval of the Central Government, make an application to any court having jurisdiction in this behalf for the purpose of cancelling or varying any contract or agreement entered into at any time before the issue of the notified order under Section 18-A, between the industrial undertaking and any other person and the court may, if satisfied after due inquiry that such contract or agreement had been entered into in bad faith and is detrimental to the interests of the industrial undertaking, make an order cancelling or varying (either unconditionally or subject to such conditions as it may think fit to impose) that the contract or agreement shall have effect accordingly.

In *Pradip Lamp Works* v. *Pratap Chandra Basu*[1] it was held that a proceeding under Section 18-C of this Act is a proceeding which a person or body of persons authorised under Section 18-A of the Act alone can institute. And when the said person or body of persons becomes or become *functus officio* the proceeding already launched must abate.

Section 18-D. No right to compensation for termination of office or contract.—Notwithstanding anything contained in any law for the time being in force, no person who ceases to hold any office by reason of the provisions contained in clause (a) of Section 18-B, or whose contract of management is terminated by reason of the provisions contained in clause (b) of that section, shall be entitled to any compensation for the loss of office or for the premature termination of the contract of management :

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1. AIR 1972 Cal 301.

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Provided that nothing contained in this section shall affect the right of any such person to recover from the industrial undertaking money recoverable otherwise than by way of such compensation.

Section 18-E. Application of Act 7 of 1913.—(1) Where the management of an industrial undertaking being a company as defined in the Indian Companies Act, 1913, is taken over by the Central Government, then notwithstanding anything contained in the said Act, or in memorandum or articles of association of such undertaking—

(a) it shall not be lawful for the shareholders of such undertaking or any other person to nominate or appoint any person to be a director of the undertaking ;

(b) no resolution passed at any meeting of the shareholders of such undertaking shall be given effect to unless approved by the Central Government ;

(c) no proceeding for the winding up of such undertaking or for the appointment of a receiver in respect thereof shall lie in any court except with the consent of the Central Government.

(2) Subject to the provisions contained in sub-section (1) and to the other provisions contained in this Act and subject to such other exceptions, restrictions and limitations, if any, as the Central Government may, by notification in the official Gazette, specify in this behalf, the Indian Companies Act, 1913 shall continue to apply to such undertaking in the same manner as it applied thereto before the issue of the notified order under Section 18-A.

The expression "no proceeding.....shall lie" under clause (c) of Section 18-E(1) refers to any and every proceeding connected with the winding up. The word 'lie' is of sufficient amplitude to include not only the filing of a petition for the winding up of a company but also its maintainability after the Central Government takes over its management. Section 18-E(1)(c) on its own terms is clearly retrospective in effect and the winding up petition having been filed already is of no avail.[1]

In re *India Electric Works*,[2] is another decision on this section. In this case the management of the company was taken over by the Central Government by passing an order under Section 18-A of this Act. The Government of India appointed the petitioner, State Bank of India the bankers of the company. As the company had been incurring heavy losses year after year the petitioner applied for winding up of the company. Some creditors supported and some opposed the petition for winding up. A dispute was raised by the creditors and shareholders regarding the validity of sanction given by the Central Government under the section. It was held that the shareholders or creditors of such company are not entitled to challenge the validity of liquidation proceeding on the ground of validity of the sanction as the section does not give any right to them.

Section 18-F. Power of Central Government to cancel notified order under Section 18-A.—If at any time it appears to the Central Government on the application of the owner of the industrial undertaking or otherwise that the purpose of the order made under Section 18-A has been fulfilled or that for any other reason it is not necessary that the order should remain in force, the Central Government may, by notified order, cancel such order and on the cancellation of any such order the management or the control, as the case may be, of the industrial undertaking shall vest in the owner of the undertaking.

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1. (1968) 38 Com. Cases 533.
2. AIR 1970 Cal 308.

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CHAPTER V
MANAGEMENT OR CONTROL OF INDUSTRIAL UNDERTAKINGS OWNED BY COMPANIES IN LIQUIDATION

This chapter was added as Chapter III-AA by an amendment of the Act in year 1971.

Section 18-FA. Power of Central Government to authorise, with permission of the High Court persons to take over management or control of industrial undertakings.—(1) If the Central Government is of opinion that there are possibilities of running or restarting an industrial undertaking, in relation to which an investigation has been made under Section 15-A, and that such industrial undertaking should be run or re-started, as the case may be, for maintaining or increasing the production, supply or distribution of articles or, class of articles relatable to the scheduled industry, needed by the general public that Government may make an application to the High Court praying for permission to appoint any person or body of persons to take over the management of the industrial undertaking or to exercise in respect of the whole or any part of the industrial undertaking such function of control as may be specified in the application.

(2) Where an application is made under sub-section (1), the High Court shall make an order empowering the Central Government to authorise any person or body of person (hereinafter referred to as the 'authorised persons') to take over the management of the industrial undertaking or to exercise functions of control in relation to the whole or any part of the industrial undertaking (hereinafter referred to as the 'concerned part') for a period not exceeding five years :

Provided that if the Central Government is of opinion that it is expedient in the interest of the general public that the authorised person should continue to manage the industrial undertaking, or continue to exercise functions of control in relation to the concerned part, as the case may be, after the expiry of the period of five years aforesaid, it may make an application to the High Court for the continuance of such management of functions of control, for such period, not exceeding two years at a time, as may be specified in the application and thereupon the High Court may make an order permitting the authorised person to continue to manage the industrial undertaking or to exercise functions of control in relation to the concerned part :

Provided further that the total period of such continuance after the expiry of the initial period of five years shall not, in any case, be permitted to exceed twelve years.

(3) Where an order has been made by the High Court under sub-section (2), the High Court shall direct the Official Liquidator or any other person having, for the time being charge of the management or control of the industrial undertaking, whether by or under the orders of any court, or any contract or instrument or otherwise to make over the management of such undertaking or the concerned part, as the case may be, to the authorised person and thereupon the authorised person shall be deemed to be Official Liquidator in respect of the industrial undertaking or the concerned part, as the case may be.

(4) Before making over the possession of the industrial undertaking or the

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concerned part to the authorised person, the Official Liquidator shall make a complete inventory of all the assets and liabilities of the industrial undertaking or the concerned part, as the case may be, in the manner specified in Section 18-FG and deliver a copy of such inventory to the authorised person, who shall, after verifying the correctness thereof, sign on the duplicate copy thereof as evidence of the receipt of the inventory by him.

(5) On taking over the management of the 'industrial undertaking' or on the commencement of the exercise of functions of control in relation to the concerned part, the authorised person shall take immediate steps to so run the industrial undertaking or the concerned part as to ensure the maintenance of production.

(6) The authorised person may, on such terms and conditions and subject to such limitations or restrictions as may be prescribed, raise any loan for the purpose, create a floating charge on the current assets of the industrial undertaking or the concerned part as the case may be.

(7) Where the authorised person is of opinion that the replacement or repair of any machinery of the industrial undertaking or the concerned part is necessary for the purpose of efficient running of the industrial undertaking or such part he shall, on such terms and conditions and subject to such limitations or restrictions as may be prescribed, make such replacement or repair, as the case may be.

(8) The loan obtained by the authorised person shall be recovered from the assets of the industrial undertaking or the concerned part, in such manner and subject to such conditions as may be prescribed.

(9) For the purpose of running the industrial undertaking, or exercising functions of control in relation to the concerned part, the authorised person may employ such of the former employees of the industrial undertaking whose services became discharged by reason of the winding up of the company owning such undertaking and every such person employed by the authorised person shall be deemed to have entered into a fresh contract of service with the company.

(10) The proceedings in the winding up of the company in so far as they relate to—

(a) the industrial undertaking the management of which has been taken over by the authorised person under this section, or

(b) the concerned part in relation to which any function of control is exercised by the authorised person under this section,

shall during the period of such management or control, remain stayed, and in computing the period of limitation for the enforcement of any right, privilege, obligation or liability in relation to such undertaking or the concerned part, the period during which such proceedings remained stayed shall be excluded.

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CHAPTER VI
POWER TO PROVIDE RELIEF TO CERTAIN INDUSTRIAL UNDERTAKINGS

This chapter was added as Chapter III-AB of the Act by an amendment in the year 1971.

Section 18-FB. Power of Central Government to make certain declaration in relation to industrial undertakings, the management or control of which has been taken over under Section 18-A, Section 18-AA or Section 18-FA.—(1) The Central Government may, if it is satisfied, in relation to an industrial undertaking or any part thereof, the management or control of which has been taken over under Section 18-A whether before or after the commencement of the Industrial (Development and Regulation) Amendment Act, 1971, or under Section 18-AA or Section 18-FA, that it is necessary so to do in the interests of the general public with a view to preventing fall in the volume or production of any scheduled industry, it may, by notified order, declare that—

(a) all or any of the enactments specified in the Third Schedule shall not apply or shall apply with such adaptations, whether by way of modification, addition or omission (which does not however, affect the policy of the said enactments) to such industrial undertaking, as may be specified in such notified order, or

(b) the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force (to which such industrial undertaking or the company owning such undertaking is party or which may be applicable to such industrial undertaking or company) immediately before the date of issue of such notified order shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified in the notified order.

(2) The notified order made under sub-section (1) shall remain in force, in the first instance, for a period of one year but the duration of such notified order may be extended from time to time by a further notified order by a period not exceeding one year at a time :

Provided that no such notified order shall, in any case, remain in force—

(a) after the expiry of the period for which the management of the industrial undertaking was taken over under Section 18-A, Section 18-AA or Section 18-FA, or

(b) for more than five years in the aggregate from the date of issue of the first notified order,

whichever is earlier.

(3) Any notified order made under sub-section (1) shall have effect notwithstanding anything to the contrary contained in any other law, agreement or instrument or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order.

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(4) Any remedy for the enforcement of any right, privilege, objection or liability referred to in clause (b) sub-section (1) and suspended or modified by a notified order, made under that sub-section, shall in accordance with the terms of notified order remain suspended or modified, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall accordingly remain stayed or be continued subject to such adaptations, so however, that on the notified order ceasing to have effect—

(a) any right, privilege, obligation or liability so remaining, suspended or modified shall become revived and enforceable as if the notified order had never been made ;

(b) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1), the period during which it or the remedy for the enforcement thereof remained suspended shall be excluded.

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CHAPTER VII
LIQUIDATION OR RECONSTRUCTION OF COMPANIES

This chapter was added as Chapter III-AC by an amendment of the Act in the year 1971.

Section 18-FC. Power of Central Government to call for report on the affairs and working of managed company.—Where the management or control of an industrial undertaking has been taken over under Section 18-A, whether before or after the commencement of the Industrial (Development and Regulation) Amendment Act, 1971, or under Section 18-AA or Section 18-FA, the Central Government may, at any time during the continuance of such management or control, call for a report from the authorised person on the affairs and working of the industrial undertaking and in submitting the report the authorised person shall take into account the inventory and the lists of members and creditors prepared under Section 18-FG.

Section 18-FD. Power of Central Government in relation to managed company.—(1) If, on receipt of the report submitted by the authorised person, the Central Government is satisfied—

(a) in relation to the company owning the industrial undertaking, which is not being wound up by the High Court that the financial conditions and other circumstances of the company are such that it is not in a position to meet its current liabilities out of its current assets, that Government may, if it considers necessary or expedient in the interests of the general public so to do, by order, decide that industrial undertaking should be sold as a running concern as provided in Section 18-FE and proceedings should simultaneously be started for the winding up, by the High Court, of the company ;

(b) in relation to the company. owning the industrial undertaking, which is being wound up by the High Court, that its assets and liabilities are such that in the interests of its creditors and contributors the industrial undertaking should be sold as a running concern as provided in Section 18-FE, it may, by order, decide accordingly.

(2) Notwithstanding anything contained in sub-section (1) if, on receipt of the report submitted by the authorised person, the Central Government is satisfied that—

(a) in the interests of the general public, or

(b) in the interests of the share-holders, or

(c) to secure the proper management of the company owning the industrial undertaking,

it is necessary so to do Government may, by order, decide to prepare a scheme for the reconstruction of the company owning the industrial undertaking :

Provided that no such scheme shall be prepared in relation to a company which is being wound up by or under the supervision of the High Court, except with the previous permission of that Court.

(3) The powers exercisable by the Central Government under Section 18-F in relation to an undertaking taken over under Section 18-A, shall also be exercisable in relation to an undertaking taken over under Section 18-AA or Section 18-FA, but such powers shall not be exercised after the making of an order under sub-section (1), or as

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the case may be, under sub-section (2) of this section.

Section 18-FE. Provision where Government decides to follow the course of action specified in Section 18-FD.—(1) The provisions hereinafter laid down shall apply where the Central Government decides that the course of action specified in sub-section (1) of Section 18-FD should be followed, namely—

(a) the decision of the Central Government that the course of action specified in clause (a) of sub-section (1) of Section 18-FD should be followed in relation to a company owning an industrial undertaking shall be deemed to be a ground specified in Section 433 of the Companies Act, 1956, on which the company may be wound up by the High Court ;

(b) the authorised person shall, as soon as may be, after the decision specified in clause a of sub-section (1) of Section 18-FD has been taken by the Central Government, present an application to the High Court for the winding up of the company owning the industrial undertaking ;

(c) when an application is made by the authorised person, under clause (b), for the winding up, by the High Court, of the company owning the industrial undertaking, the High Court shall order the winding up of the company and shall notwithstanding anything contained in the Companies Act, 1956 appoint the authorised person as the Official Liquidator in relation to such undertaking ;

(d) whenever the Central Government decides under clause (b) of sub-section (1) of Section 18-FD that the industrial undertaking should be sold as a running concern, it shall cause a copy of its decision to be laid before the High Court ;

(e) until the industrial undertaking referred to in clause (a) or clause (b) of sub-section (1) of Section 18-FD is sold or purchased in pursuance of this section, the authorised person shall continue to function as the Official Liquidator in relation to the said undertaking in the winding up proceedings of the company, and thereafter, the Official Liquidator appointed by the Central Government under Section 488 of the Companies Act, 1956 shall take over and function as the Official Liquidator in the said proceedings.

(2) The authorised person shall make a report to the Central Government as to what should be the reserve price for the sale of the industrial undertaking as a running concern.

(3) In making a report under sub-sectin (2), the authorised person shall have regard to—

(a) the financial condition of the company owning the industrial undertaking on the date on which the order under Section 18-FD is made—

(i) as disclosed in its books of account ;

(ii) as disclosed in its balance-sheet and profit and loss account during a period of five years immediately preceding the said date ;

(b) the condition and nature of the plant, machinery, instruments and other equipment from the point of view of their suitability for profitable use in the running of the industrial undertaking ;

(c) the total amount of liability on account of secured and unsecured debts including overdrafts, if any, drawn on banks, liabilities on account of terminal benefits to the employees and other borrowings and other liabilities of the company ; and

(d) other relevant factors including the factor that the industrial undertaking will be sold free from all encumbrances,

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(4) Notice of the reserve price determined by the authorised person shall be given in such manner as may be prescribed to the members and creditors of the company owning such industrial undertaking to make representations within a specified time to the Central Government through the authorised person and the Central Government shall, after considering the representations received and the report of the authorised person, determine the reserve price.

(5) The authorised person, shall, therefore, with the permission of the High Court, invite tenders from the public in such manner as may be determined by the High Court for the sale of the industrial undertaking as a running concern subject to the condition that it will be sold to the person offering the highest price which shall not be less than the reserve price determined under sub-section (4) :

Provided that the High Court shall not refuse to grant such permission if it is satisfied that the company is not in a position to meet its current liabilities out of its current assets.

(6) The industrial undertaking shall be sold to the highest bidder as a running concern, only if the price offered by him therefor is not less than the reserve price.

(7) Where no offer of price is equal to, or more than, the reserve price, the industrial undertaking shall be purchased by the Central Government at the reserve price.

(8)(a) The amount realised from the sale of the industrial undertaking as a running concern together with any other sum which may be realised from any contributory, purchaser or any other person from whom any money is due to the company shall be utilised in accordance with the provisions of the Companies Act,1956 in discharging liabilities of the company and distributing the balance, if any, amongst the members of the company.

(b) In other respects, the provisions of the Companies Act, 1956 relating to the winding up of a company by the High Court shall, as far as may be, apply.

(9) When an industrial undertaking is sold to any person under sub-section (6) or purchased by the Central Government under sub-section (7), there shall be transferred to and vested in the purchaser, free from all encumbrances, all such assets relating to the industrial undertaking as are referred to in sub-clause (i) of clause (a) of Section 18-FG and existing at the time of sale or purchase.

Section 18-FF. Provisions where Government decides to follow the course of action specified in Section 18-FD(2).—(1) Where in any case the Central Government decides that the course of action specified in sub-section (2) of Section 18-FD shall be followed, it should, subject to the provisions of that sub-section, cause to be prepared, by the authorised person a scheme for the reconstruction of the company, owning the industrial undertaking, in accordance with the provision hereinafter contained and the authorised person shall submit the same for the approval of that Government.

(2) The scheme for the reconstruction of the company owning the industrial undertaking may contain provisions for all or any of the following matters, namely—

(a) the constitution, name and registered office, the capital assets, powers, rights, interest, authorities and privileges, the liabilities, duties and obligations of the company on its reconstruction ;

(b) any change in the Board of Directors, of the appointment of a new Board of Directors of the company on its reconstruction and authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made in the case of appointment of a new Board of Directors or of any Director, the period for which such

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appointment shall be made ;

(c) the investing of controlling interest, in the reconstructed company, in the Central Government either by the appointment of additional directors or by the allotment of additional shares ;

(d) the alteration of the memorandum and articles of association of the company, on its reconstriction, to give effect to such reconstruction ;

(e) subject to the provisions of the scheme, the continuation by or against the company, on its reconstruction, of any action or proceeding pending against the company immediately before the date of its reconstruction ;

(f) the reduction of the interest or rights which the members and creditors have in or against the company before its reconstruction to such extent as the Central Government may consider necessary in the interests of the general public, or in the interests of the members and creditors or for the maintenance of the business of the company :

Provided that nothing contained in the clause shall be deemed to authorise the reduction of the interest or rights of any creditor (including Government) in respect of any loan or advance made by that creditor to the company after the date on which the management of the industrial undertaking of the company has been taken over under Section 18-A, Section 18-AA or Section 18-FA ;

(g) the payment in cash or otherwise to the creditors in full satisfaction of their claim—

(i) in respect of their interest or rights in or against the company before its reconstruction ; or

(ii) where their interest or rights in or against the company has or have been reduced under clause (1), in respect of such interest or rights as so reduced ;

(h) the allotment to the members of the company for shares held by them therein before its reconstruction [whether their interest in such shares has been reduced under clause (f) or not], of shares in the company on its reconstruction and where it is not possible to allot shares to any members, the payment in cash to those members in full satisfaction of their claim—

(i) in respect of their interest in shares in the company before its reconstruction, or

(ii) where such interests has been reduced under clause (f) in respect of their interest in share as so reduced,

(i) the offer by the Central Government to acquire by negotiations with the members of the company their respective shares on payment in cash to those members who may volunteer to sell their shares to the Central Government in full satisfaction of their claim—

(i) in respect of their interest in shares in the company before its reconstruction, or

(ii) where such interest has been reduced under clause (f) in respect of their interest in shares as so deduced ;

(j) the conversion of any debentures issued by the company, after the taking over of the management of company, under Section 18-A or Section 18-AA or Section 18-FA or of any loans obtained by the company after that date or of any part of such debentures or loans, into shares, in the company and the allotment of those shares to such debenture-holders or creditors, as the case may be ;

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(k) the increase of the capital of the company by the issue of new shares and

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the allotment of such new shares to the Central Government ;

(l) the continuance of the services of such of the employees of the company as the Central Government may specify in the scheme in the company itself, on its reconstruction, on such terms and conditions as the Central Government thinks fit ;

(m) notwithstanding anything contained in clause (1), where any employees of the company whose services have been continued under clause (1) have, by notice in writing given to the company at any time before the expiry of one month next following the date on which the scheme is sanctioned by the High Court, intimated their intention of not becoming employees of the company and to other employees whose services have not been continued on the reconstruction of the company, of compensation, if any, to which they are entitled under the Industrial Disputes Act, 1947 and such pension, gratuity, provident fund and other retirement benefits ordinarily admissible to them under the rules or authorisations of the company immediately before the date of its reconstruction ;

(n) any other terms and conditions for the reconstructions of the company ;

(o) such incidental, consequent and supplemental matters as are necessary to secure that the reconstruction of the company shall be fully and effectively carried out.

(3)(a) A copy of the scheme, as approved by the Central Government shall be sent in draft to the company, to the registered trade unions, if any, of which the employees of the company are members and to the creditors thereof for suggestions and objections, if any, within such period as the Central Government may specify for this purpose.

(b) The Central Government may make any such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the company, from the registered trade unions of which the employees of the company are members and from any members or creditors of the company.

(4) The scheme shall thereafter be placed before the High Court for its sanction and the High Court, if satisfied that the scheme is in the interests of the general public or in the interests of the shareholders or for securing the proper management of the company and that the scheme is designed to be fair and reasonable to the members and creditors of the company may, after giving a reasonable opportunity to the company and to its members and creditors of showing cause, sanction the scheme without any modification or with such modification as it may consider necessary.

(5) The scheme, as so sanctioned by the High Court, shall come into force on such date as the Court may specify in this behalf :

Provided that different dates may be specified for different provisions of the scheme.

(6) The sanction accorded by the High Court under sub-section (4) shall be conclusive evidence that all the requirements of this section relating to the reconstruction of the company have been complied with, and a copy of the sanctioned scheme certified by the High Court to be a true copy thereof, shall in all legal proceedings (whether original or in appeal or otherwise), be admitted as evidence to the same extent as the original scheme.

(7) On and from the date of the coming into operation of the scheme or any provision thereof, scheme or such provision shall be binding on the company and also on all the members and other creditors and employees of the company and on any other person having any right or liability in relation to the company.

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(8) On the coming into operation of the scheme or any provision thereof, the authorised person shall cease to function, and the management of the reconstructed company shall be assumed by the Board of Directors as provided in the scheme.

(9) Copies of the scheme shall be laid before each House of Parliament. as soon as may be, after the scheme has been sanctioned by the Court.

(10) The provisions of this section and of any scheme made thereunder shall have effect notwithstanding anything contained in Sections 391 to 394-A (both inclusive) of the Companies Act, 1956.

Section 18-FG. Preparation of inventory of assets and liabilities and list of members and creditors of managed company.—For the purposes of this Act the authorised person shall, as soon as may be, after taking over the management of the industrial undertaking of a company under Section 18-A or Section 18-AA or Section 18-FA—

(a) prepare a complete inventory of—

(i) all properties, movable and immovable, including lands, buildings, works, workshops, stores, instruments, plant, machinery, automobiles and other vehicles, stocks of materials in the course of production, storage, or transit, raw materials, cash in balances, cash in hand, deposits in bank or with any other person or body or on loan reserve funds investments and books, debts and all other rights and interests arising out of such property as were immediately before the date of taking over of the industrial undertaking in the ownership, possession, power or control of the company, whether within or without India ; and all books of account, registers, maps, sections, drawings, records, documents or titles of ownership of property, and all other documents of whatever nature relating thereto ; and

(ii) all borrowings, liabilities, and obligations of whatever kind of the company including liabilities on account of the management of the industrial undertaking showing separately in the list of creditors, the secured creditors and the unsecured creditors :

Provided that where the management of the industrial undertaking of a company has been taken over under the said Section 18-A before the commencement of the Industrial (Development and Regulation) Amendment Act, 1971, the aforesaid functions shall be performed by the authorised person within six months from such commencement.

Section 18-FH. Stay of suits and other proceedings.—In the case of a company in respect of which an order under Section 18-FD has been made, no suit or other legal proceeding shall be instituted or continued against the company except with the previous permission of the Central Government or any officer or authority authorised by that Government in this behalf.

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CHAPTER VIII
CONTROL OF SUPPLY, DISTRIBUTION, PRICE, ETC. OF CERTAIN ARTICLES

Section 18-G. Power to control, supply, distribution, price, etc. of certain articles.—(1) The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair prices of any article or class of articles relatable to any scheduled industry, may, notwithstanding anything contained in any other provision of this Act by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), a notified order made thereunder may provide—

(a) for controlling the prices at which any such article or class thereof may be bought or sold ;

(b) for regulating by licences, permits or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any such article or class thereof ;

(c) for prohibiting the withholding from sale of any such article or class thereof ordinarily kept for sale ;

(d) for requiring any person manufacturing, producing or holding in stock any such article or class thereof to sell the whole or part of the articles so manufactured or produced during a specified period or to sell the whole or a part of the articles so held in stock to such person or class of persons and in such circumstances as may be specified in the order ;

(e) for regulating or prohibiting any class of commercial or financial transactions relating to such article or class thereof which in the opinion of the authority making the order are, or if unregulated are likely to be detrimental to public interest ;

(f) for requiring persons engaged in the distribution and trade and commerce in any such article or class thereof to make the articles exposed or intended for sale with the sale price or to exhibit at some easily accessible place on the premises the price lists of articles held for sale and also to similarly exhibit on the first day of every month, or at such other time as may be prescribed, a statement of the total quantities of any such articles in stock ;

(g) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters ; and

(h) for any industrial or supplementary matters, including, in particular, the grant or issue of licences, permits, or other documents and charging of fees therefor.

(3) Where in pursuance of any order made with reference to clause (d) of sub-section (2), any person sells any article, there shall be paid to him the price therefor—

(a) where the price can, consistently with the controlled price, if any, be fixed by agreement, the price so agreed upon ;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any, fixed under this section ;

(c) where neither clause (a) nor clause (b) applies, the price calculated at the

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market rate prevailing in the locality at the date of sale.

(4) No order made, in exercise of any power conferred by this section shall be called in quetion in any Court.

(5) Where an order purports to have been made and signed by an authority in exercise of any power conferred by this section, a Court shall within the meaning of the Indian Evidence Act, 1872 presume that such order was so made by the authority.

Explanation.—In this section, the expression "article or class of articles" relatable to any scheduled industry includes any article or class of articles imported into India which is of the same nature or description as the article or class of articles manufactured or produced in the scheduled industry.

In *Jaipur Udhyog* v. *Union of India*,[1] the petitioner was a limited company carrying on business in the manufacture of cement. In exercise of powers conferred by Section 18-G and Section 25 of this Act, the Central Government made the Cement Control Order, 1967 regulating the supply, distribution and trade and commerce in cement for securing its equitable distribution and availability at fair price. This order was challenged on many grounds. It was held that—

(a) the impugned order is neither outside the scope of Section 18-G, nor is based on extraneous considerations because it was made to ensure equitable distribution and availabiltiy of cement to consumers at a fair price throughout the country and also to build up export market for cement.

(b) power of the Central Government to prohibit removal of cement outside the precincts of the factory or outside the premises of the producer is implied in the general power conferred by Section 18-G of the Act and unless it were so conferred, it may be difficult to carry out the purpose and object of the Cement Control Order. Moreover in the absence of any instance it cannot be presumed that the Government will abuse its power in the matter of granting permission for removal of cement from the factory as and when it is sought on just and proper grounds. The permission for removal contemplated under this clause is only formal. This is only an incidental and supplementary provision and is not intended to operate as a restriction.

In *G.P. Shivaprakash* v. *Union of India*,[2] it was held that clause (b) of Section 18-G (2) enables the Government to impose restrictions or conditions on a manufacturer or a dealer or a consumer of any scheduled article. The concept of distribution or acquisition involves two parties—the distributor or supplier or vendor on one hand and the purchaser acquirer on the other. Thus the power of the Government to impose restrictions applies to manufacturer, dealer or consumer.

Articles referred to in Section 18-G are articles relatable to industry and not relatable to goods manufactured by that industry.[3] Restrictions imposed on distribution and supply of certain articles by an earlier order may be varied and modified by the Government in the exercise of powers conferred by this section.[4] Where the object of an order made under this section is to secure equitable distribution and availability at fair prices of certain articles, the order cannot be said to be *ultra vires* under Section 18-G.[5] So also an order regarding control of certain article will not be discriminatory simply because it is made applicable to one particular State and not to other States.[6]

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1. AIR 1969 Raj 281.
2. AIR 1968 Mys 245.
3. (1969) 2 An WR 402.
4. (1969) Ker LJ 1125.
5. *Ibid.*
6. (1969) 2 An WR 402.

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CHAPTER IX
MISCELLANEOUS

Section 19. Powers of inspection.—(1) For the purpose of ascertaining the position of working of any industrial undertaking or for any other purpose mentioned in this Act or the rules made thereunder, any person authorised by the Central Government in this behalf shall have the right—

(a) to enter and inspect any premises ;

(b) to order the production of any document, book, register or record in the possession or powers of any person having the control of, or employed in connection with, any industrial undertaking ; and

(c) to examine any person having the control of, or employed in connection with, any industrial undertaking.

(2) Any person authorised by the Central Goverment under sub-section (1) shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860.

Section 20. General prohibition of taking over the management or control of industrial undertaking.—After the commencement of this Act, it shall not be competent for any State Government or a local authority to take over the management or control of any industrial undertaking under any law for the time being in force which authorises any such Government or local authority so to do.

The true meaning of Section 20 is that if any action is sought to be taken under the Act, it could not be held that by reason of Section 20, it was no longer competent to the State legislature to make any law or to take any action.[1]

In *National Sugar Mills* v. *State*,[2] the Government of West Bengal took over possession of assets of National Sugar Mills in pursuance to a mortgage deed. It was contended by the petitioner that the order of the Government taking over the possession of the assets of the Mill was in contravention of Section 20 of this Act and was, therefore, illegal. It was held that :

> "Section 20 of the Act applies only when management or control of any industrial undertaking is taken over by the State Government pursuant to any law for the time being in force which authorises the State Government to do so. In other words, if any particular provision of any statute authorises the State Government to take over management or control of any industrial undertaking and the State Government chooses to exercise such powers in pursuance of any such provisions, then the provisions of Section 20 are attracted. But Section 20 has no application to any case of taking over possession on the basis of any arrangement or agreement betwen the parties for Section 20 does not deal with any contractual right or obligations of the parties and it does not preclude the State Government from asserting right on the basis of any contract between the parties. Hence, when the State Government, as the mortgagee, takes over the possession of the mortgaged property, an industrial undertaking, on the basis of the provisions of the mortgage deed, for default by the mortgagor, then the provisions of Section

1. In re *Oriental Gas Co. Ltd.*, AIR 1961 Cal 267.
2. AIR 1967 Cal 609.

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20 of the Act will not be attracted and the action of the State Government is valid."

In *Calcutta Gas Company (Pvt.) Ltd.* v. *State of W.B.*[1] the validity of Section 20 of the Act was challenged on the ground that 'gas industry' is covered by Entry 24 of List II and as such any Parliamentary legislation in so far as it affects that Entry is void. It was held that the expression 'industry' in Entry 52 of List I bears the same meaning as that in Entry 24 of List II. The result is that 'industry' in Entry 52 of List I does not take in a gas industry. If so, it follows that the Industrial (Development and Regulation) Act, 1951 in so far as it purports to deal with the gas industry is beyond the legislative competence of Parliament. Section 20 is an integral part of the Act, and if it is taken out of the Act, it can only operate in vaccum. Therefore, if the Act is constitutionally void in so far as it purports to affect the gas industry, for the aforesaid reasons, Section 20 will equally be void to the same extent for the same reasons.

Section 21. Certain administrative expenses of Development Councils to be paid from money provided by Parliament.—Such administrative expenses as relate to the emoluments of officers of a Development Council who are appointed by or with the approval of the Central Government, shall be defrayed out of money provided by Parliament.

Section 22. Power of the Central Government to issue direction.—In the exercise of its functions under this Act, every Development Council shall be guided by such instructions as may be given to it by the Central Government and such instructions may include directions relating to the manner in which and the purpose for which any proceeds of the cess levied under Section 9 which may have been handed over to it, shall be extended.

Section 23. Decision of Central Government final respecting certain matter.—If, for the purposes of this Act, any question arises as to whether—

(a) there has been a substantial expansion of an industrial undertaking, or

(b) an industrial undertaking is producing or manufacturing any new article,

the decision of the Central Government thereon shall be final.

Section 24. Penalties.—(1) If any person contravenes or attempts to contravene or abets the contravention of—

(i) the provisions of sub-section (1) of Section 10, or of sub-section (1) or sub-section (4) of Section 11, or Section 11-A or of sub-section (1) of Section 13 or of sub-section (2), (2-A), (2-D), (2-E) and (2-G) of Section 29-B, or

(ii) any direction issued under Section 16 or sub-section (3) of Section 18-B, or

(iii) any order made under Section 18-G, or

(iv) any rule the contravention of which is made punishable under this section,

he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both, and, in the case of a continuing contravention, with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

(2) If the person contravening any of the said provisions is a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly :

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1. AIR 1962 SC 1044.

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Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(3) Notwithstanding anything contained in sub-section (2), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with consent or connivance of, or is attributable to any neglect on the part of, any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(4) Notwithstanding anything contained in sub-section (2), where an offence under this Act has been committed by a company and it is provided that the offence has been committed with consent or connivance of or is attributable to any neglect on the part of any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) "company" means any body corporate and includes a firm, or association of individuals ; and

(b) "director" in relation to a firm means a partner in the firm.

In *Jagannath Prasad* v. *State of Bihar*,[1] the petitioner was a licensee of cement. He was prosecuted for an offence under Section 24 of this Act for failing to store cement at a place mentioned in column 2 of licence issued to him. It was contended that the failure would amount to violation of clause 5(1) of the Bihar Cement Control Order, 1955 and would constitute an offence under Section 24 of the Industries (Development and Regulation) Act, 1951. It was held that :—

> "If a licensee of cement stores cement at any place other than those mentioned in column 2 of the licence issued to him, that would amount to contravention of the terms and conditions of the licence and would, therefore, constitute an offence under Section 24 of the Industries (Development and Regulation) Act, 1951, as it amounts to violation of the provision of sub-section (1) of clause 5 of the Bihar Control Order, 1955, which has been issued by the State Government in exercise of the powers conferred by Section 25 of the Act read with Section 18-G of the Act :"

Section 24-A. Penalty for false statement.—If any person—

(a) when required by this Act or by any order under this Act to make any statement or furnish any information, makes any statement or furnishes any information which is false in any material particular and which he knows or has reasonable cause to believe to be false or does not believe to be true ; or

(b) makes any such statement as aforesaid in any book, account, record, declaration, return or other document, which he is required by any other direction or order made under this Act to maintain or furnish ;

he shall be punishable with imprisonment which may extend to three months or with fine which may extend to two thousand rupees, or with both.

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1. AIR 1968 Pat 506.

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Section 25. Delegation of powers.—(1) The Central Government may, by notified order, direct that any power exercisable by it under this Act (other than the power to it by Sections 16, 18-A, 18-AA and 18-FA) shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by such officer or authority (including in the said expression any Development Council, State Government or officer or authority subordinate to the Central Government) as may be specified in the direction.

(2) Any power exercisable by the State Government by virtue of a direction under sub-section (1) may, unless otherwise provided in such direction, be exercised also by such officer or authority subordinate to State Government as it may, by notified order, specify in this behalf.

In *Jaipur Udhyog* v. *Union of India*,[1] the appointment of Cement Corporation of India as "controller" was challenged by the petitioner on the ground that the Central Government could under Section 25 delegate its power to an officer or authority and the said corporation was neither of the two.

It was held that, it is true that under Section 25, the power can be delegated by the Central Government either to an officer or an authority. The Cement Corporation of India Ltd., is not an officer. The word 'authority' has not been defined in the Act, but it has been mentioned in the section itself that it will include any Development Council, State Government or officer or authority subordinate to the Central Government. It is clear from the Memorandum and Articles of Association of the said Corporation that it was registered as a company and no powers were conferred upon it to carry out governmental or quasi-governmental functions. The intention of the Legislature clearly was that any person to whom the Government may delegate its functions under the Act must be an officer or authority. In this view of the matter, it must be held that the definition of the term "controller" in clause 2(b) of the Cement Control Order is bad and must be struck down.[2]

Section 26. Power to issue directions.—The Central Government may give directions to any State Government as to the carrying into execution in the State of any of the provisions of this Act or of any order or direction made thereunder.

Section 27. Cognizance of offences.—No court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in Section 21 of the Indian Penal Code.

In *Jagannath Prasad* v. *State of Bihar*,[3] the petitioner was prosecuted for storing cement at a place other than that mentioned in the licence. Before launching of the prosecution he was not asked to explain as to why he had kept bags at that place. It was held that mere failure to call upon the accused to explain why he had kept cement bags at a particular place would not be a valid ground for holding that cognizance of case has not been taken validly. In this case the facts embodied in the charge-sheet constituted an offence under Section 24 of the Act but the police officer expressed his opinion about a *prima facie* case under Section 7 of the Essential Commodities Act and Rules 125 and 42 of Defence of India Rules having been made out. To this it was held that when the facts embodied in the charge sheet constituted an offence under Section 24 then mere expression of opinion by the police officer as stated above could not debar the Magistrate from taking cognizance under relevant provisions of the Industries (Development and Regulation) Act, 1951.

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1. AIR 1969 Raj 281.
2. AIR 1968 Pat 506.
3. *Ibid.*

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Section 28. Burden of proof in certain cases.—Where any person is prosecuted for contravention of any order made under Section 18-G which prohibits him from doing an act or being in possession of a thing without lawful authority or without a permit, licence or other document, the burden of proving that he has such authority, permit, licence or other document shall be on him.

Section 29. Jurisdiction of courts.—(1) Subject to the provisions of sub-section (2) no court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

(2) Any Magistrate or bench of Magistrates empowered, for the time being to try in a summary way the offences specified in sub-section (1) of Section 260 of the Code of Criminal Procedure, 1898 may, on application in this behalf being made by the prosecution, try, in accordance with the provisions contained in Sections 262 to 265 of the said Code, any offence which consists of a contravention of an order made under Section 18-G.

Section 29-A. Special provision regarding fines.—Notwithstanding anything contained in Section 32 of the Code of Criminal Procedure, 1898 it shall be lawful for any Magistrate of the first class and for Presidency Magistrate to pass a sentence of fine exceeding one thousand rupees on any person convicted of any offence under this Act.

Section 29-B. Power to exempt in special cases.—(1) If the Central Government is of opinion, having regard to the smallness of the number of workers employed or to the amount invested in any industrial undertaking or to the desirability of encouraging small undertakings, generally or to the stage of development of any scheduled industry, that it would not be in public interest to apply all or any of the provisions of the Act thereof, it may, by notification in the official Gazette, exempt, subject to such conditions as it may think fit to impose, any industrial undertaking or class of industrial undertakings or any scheduled industry or class of scheduled industries as it may specify in the notification from the operation of all or any of the provisions of this Act or any rule or order made thereunder.

(2) Where any notification under sub-section (1) granting any exemption is cancelled, no owner of any industrial undertaking to which the provisions of Section 10, Section 11, Section 11-A or clause (d) of sub-section (1) of Section 13, would have applied, if the notification under sub-section (1) had not been issued, shall carry on the business of the undertaking after the expiry of such period as may be specified in the notification cancelling the exemption except under and in accordance with a licence issued in this behalf by the Central Government and, in the case of the State Government, except under and in accordance with the previous permission of the Central Government.

(2-A) In particular and without prejudice to the generality of the provisions of sub-section (1) the Central Government may, if it is satisfied, after considering the recommendations made to it by the advisory committee constituted under sub-section (2-B), that it is necessary so to do for the development and expansion of ancillary, of small scale, industrial undertakings, by notified order, direct that any article or class of articles specified in the First Schedule, shall on and from such date as may be specified in the notified order, be reserved for exclusive production by the ancillary, or small scale industrial undertakings.

(2-B) The Central Government shall, with a view to determining the nature of any article or class of articles that may be reserved for production by the ancillary or small scale industrial undertakings, constitute an Advisory Committee consisting of such persons as have in the opinion of that Government, the necessary expertise to give advice on the matter.

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(2-C) The Advisory Committee shall, after considering the following matters, communicate its recommendations to the Central Government, namely :—

(a) the nature of any article or class of articles which may be produced economically by the ancillary or small scale industrial undertakings ;

(b) the level of employment likely to be generated by the production of such article or class of articles by the ancillary or small scale industrial undertakings ;

(c) the possibility of encouraging and diffusing enterpreneurship in industry ;

(d) the prevention of concentration of economic powers to the common detriment ; and

(e) such other matters as the Advisory Committee may think fit.

(2-D) The production of any reserved article or class of reserved articles by any industrial undertaking not being ancillary, or small scale industrial undertaking which on the date of reservation, is engaged in or has taken effective steps for, the production of any reserved article or class of reserved articles, shall after the commencement of the Industries (Development and Regulation) Amendment Act, 1984, or as the case may be, the date of reservation, whichever is later, be subjected to such conditions as the Central Government may, by notified order, specify.

(2-E) While specifying any condition under sub-section (2-D) the Central Government may take into consideration the level of production of any reserve article or class of reserved articles achieved, immediately before the date of reservation, by the industrial undertaking referred to in the sub-section (2-D) and such other factors as may be relevant.

(2-F) Every person or authority, not being the Central Government, who or which is registered under Section 10 or to whom, or to which, a licence has been issued or permission has been granted under Section 11 for the production of any articles or class of articles which has or have, been subsequently reserved for the ancillary or small scale industrial undertakings, shall produce, such registration certificate, licence or permission, as the case may be, within such period as the Central Government by notified order, specify in this behalf, and the Central Government may enter therein all or any of the conditions specified by it under sub-section (2-D), including the productive capacity of the industrial undertakings and other prescribed particulars.

(2-G) The owner of every industrial undertaking (not being an ancillary or small scale industrial undertaking), which immediately before the commencement of the Industries (Development and Regulation) Amendment Act, 1984 or the date of reservation, whichever is later ;—

(a) was engaged in the production of any article or class of articles, which has or have, been reserved for the ancillary, or small scale industrial undertakings ; or

(b) had before such commencement or before the date of such reservation, as the case may be, taken effective steps for commencing the production of such reserved article or class of articles,

without being registered under Section 10 or in respect of which a licence or permission has not been issued under Section 11, shall refrain from the production of such reserved articles, on and from the date of expiry of three months from such commencement or from the date of such reservation, whichever is later.

(2-H) Every notified order made under sub-section (2-A) shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of 30 days, which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session immediately following the

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session or the successive sessions, aforesaid, both Houses agree in making any modification in the notified order or both Houses agree that the notified order should not be made, the notified order shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notified order.

(3) The provisions of this Act shall apply, so far as may be in relation to the issue of a licence or permision to any industrial undertaking, referred to in sub-section (2) as they apply in relation to the issue of a licence or permission to a new industrial undertaking.

Section 29-C. Protection of action under the Act.—(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder.

(2) No suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.

Section 25-D. Debts incurred by the authorised person to have priority.—Every debt arising out of any loan obtained by the authorised person for carrying on the management of, or exercising functions of control in relation to, an industrial undertaking or part thereof, the management of which has been taken over under Section 18-A or Section 18-AA or Section 18-FA—

(a) shall have priority over all other debts, whether secured or unsecured, incurred before the management of such industrial undertaking was taken over ;

(b) shall be a preferential debt within the meaning of Section 530 of the Companies Act, 1956, and such debt shall rank equally among themselves and be paid in full out of the assets of the industrial undertaking unless such assets are insufficient to meet them in which case they shall abate in equal proportions.

Section 30. Power to make rule.—(1) The Central Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rule may provide for all or any of the following maters, namely—

(a) the constitution of the Advisory Council and Development Councils, the term of office and other conditions of service of, the procedure to be followed by, and the manner of filing casual vacancies among, members of the Advisory Council or a Development Council ;

(b) the form of the statement of account to be furnished by a Development Council ;

(c) the intervals at which, the time within which, and the manner in which the cess leviable under Section 9 shall be payable and the rebate for the payment of such cess ;

(d) the expenses which a Development Council may meet from the proceeds of the cess levied under Section 9 which may have been handed over to it ;

(e) the appointment by or with the approval of the Central Government of any officers of a Development Council ;

(f) the facilities to be provided by any industrial undertaking for the training of technicians and labour ;

(g) the collection of any information or statistics in respect of any scheduled

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industry ;

(h) the manner in which industrial undertaking may be registered under Section 10 and the levy of a fee thereof ;

(i) the procedure for the grant or issue of licences and permissions under Section 11, Section 11-A, Section 13 or Section 29-B, the time within which such licences or permissions shall be granted or issued including, in particular, the publication of notices calling for application and the holding of such public inquiry in relation thereto as may be necessary in the circumstances ;

(j) the fees to be levied in respect of licences and permissions used under this Act ;

(k) the matters which may be taken into account in the granting or issuing of licences and permissions including in particular, the previous consultation by the Central Government with the Advisory Council or any Development Council or both in regard to the grant or issue of any such licences or permissions ;

(l) the procedure to be followed in making any investigation under this Act ;

(m) the conditions which may be included in any licences and permissions ;

(n) the conditions on which licences and permissions may be varied or amended under Section 12 ;

(o) the maintenance of books, accoutns and records relating to an industrial undertaking ;

(p) the submission of special periodical returns relating to an industrial undertaking by persons having the control of, or employed in connection with, such undertaking, and the forms in which and the authorities to which, such returns and reports shall be submitted ;

(pp) any matter which is to be or may be prescribed for giving effect to the provisions of Chapter III-AA or Chapter III-AC ;

(q) any other matter which is to be or may be prescribed under this Act.

(3) Any rule made under this section may provide that contravention thereof shall be punishable under Section 24.

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Section 31. Application of other laws not barred.—The provisions of this Act shall be in addition to and not, save as otherwise expressly provided in this Act, in derogation of any other Central Act for the time being in force, relating to any of the scheduled industry.

Validation.—Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority and notwithstanding anything contained in any other law, agreement or other instrument for the time being in force, every notification made or purporting to have been made by the Central Government under the principal Act, on or after the 19th day of February 1970, reserving any article or class of articles for production by any ancillary or small scale industrial undertakings or

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any class of ancillary or small scale industrial undertaking shall, for all purposes be and shall be deemed always to have been, as valid and effective as if the amendments made to the principal Act, by this Act had been in force at all material times and such notification had been made in full compliance with the provisions made by such amendments and accordingly any reservation made or purporting to have been made by such notification shall, in accordance with the tenor thereof, have, and be deemed always to have had effect on and from the date of such reservation and shall, until it is altered or superseded by any fresh notification under the principal Act as amended by this Act, continue to have effect.

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THE PAYMENT OF BONUS ACT, 1965

Introduction.—Bonus is a cash payment made to employees in addition to wages. It is not an *ex-gratia* payment. Bonus differs from wages in that it does not rest on contract, but still payments for bonus are made because legally due, but which parties do not contemplate indefinitely. In our country bonus was for the first time granted to the employees in textile industry in July, 1917 which is known as "war bonus" because an increase in wages was allowed owing to war conditions. The question of payment of bonus had been one of the main causes of industrial disputes during post-independence days. In *K.S. Balan and others* v. *State of Kerala and another*,[1] a public sector employer was paying *ex-gratia* payment to its highly paid employees who were not entitled to get bonus. On Government disapproving such payment, the Board of Directors passed a resolution stopping payment in future and seeking to recover the amount, already paid. The employees challenged the said resolution. The petitioners have no case that the claim was linked with profit or production or connected with any festival. It was held that the claim of petitioners that the payment has become an implied condition of service cannot be accepted. Therefore there is no ground to interfere with the order of the Government stopping *ex-gratia* payment and recovery of such payments already made.

In *Mill Owners Association* v. *Rastriya Mill Mazdoor Sangh*,[2] a Full Bench of the Labour Appellate Tribunal observed that bonus could no longer be considered as an *ex-gratia* payment and laid down a formula known as "Full Bench Formula". Since both labour and capital contributed to the earnings of industrial concerns, it was only fair that labour should get some benefit if there was a surplus left after meeting prior and necessary charges. Broadly speaking the formula provided that the following prior charges should be deducted from the gross profits of an enterprise :

(i) return on paid up capital generally at the rate of six per cent ;
(ii) return on working capital varying from two to four per cent ;
(iii) depreciation worked out on a notional basis ;
(iv) rehabilitation ; and
(v) income tax.

If after deduction of these prior charges, surplus was left over the workmen would be entitled to a share in the said surplus on an equitable basis. In the absence of any surplus, however, there would be no question of payment of bonus on general notions of social justice.

Labour unions did not feel satisfied with the Full Bench Formula. Their main grievance was against the rehabilitation charge which, in their view, generally wiped out what was left of the available surplus. Some employers were also not quite happy with this formula because it did not provide an easy method for computation of bonus and often led to disputes year after year.

The Supreme Court, while approving this principle in *Muir Mill Ltd.* v. *Suti Mill Mazdoor Union*,[3] laid down two conditions which had to be satisfied before a demand

1. (1988) 2 Lab LJ 111 (Kerala).
2. (1952) LAC 423.
3. (1955) 1 LLJ 1.

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for bonus could be justified :

(1) the wages fell short of the living standard ; and

(2) the industry makes huge profits part of which are due to the contribution made by workmen in increasing production.

The demand for bonus would become an industrial claim when either or both of these conditions were satisfied. The Government of India had been under a constant pressure to revise the bonus formula.

The present Act is the outcome of the recommendations made by a Tripartite Commission, which was set up by the Government of India in 1961. The Commission was asked to consider the question of payment of bonus based on profits to employees employed in establishments. The recommendation of the Commission was received by the Government on January 24, 1964. On September 2, 1964 the Government implemented the recommendations, subject to certain modifications. With a view to accept these recommendations, the Payment of Bonus Ordinance, 1965 was promulgated on 26th May, 1965. The Ordinance later on was adopted by the Parliament and enacted as Payment of Bonus Act, 1965. Under the Act the payment of bonus has become a statutory obligation imposed upon the employers covered by the Act.

The object of the Act as contained in the preamble is to provide for payment of bonus to persons employed in certain establishments and for matters connected therewith.[1]

Broadly speaking the scheme of the Act is four dimensional[2] :

(1) to impose statutory liability upon an employer of every establishment covered by the Act to pay bonus to employees in establishment ;

(2) to define the principle of payment of bonus according to the prescribed formula ;

(3) to provide for payment of minimum and maximum bonus and linking the payment of bonus with the scheme of "set-off and set-on" ; and

(4) to provide machinery for enforcement of the liability for payment of bonus.

Section 1. Scope and application.—This Act extends to the whole of India. Sub-section (3) of Section 1 provides that save as otherwise provided in this Act, it shall apply to (a) every factory ; and (b) every other establishment in which twenty or more persons are employed on any day during an accounting year.

'Factory', has not been defined under the Act but the definition of 'factory' as under the Factories Act, 1948 has been made applicable to this Act also. 'Establishment' has also not been defined under the Act. The Act defines "establishment in private sector" and "establishment in public sector". Establishment means the place in which one is personally fixed for business with necessary equipment, any office or place of business. Subsequent reduction of strength in the number of employees would not make the Act inapplicable to an establishment.

Proviso to sub-section (3) provides that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the official Gazette, apply provisions of this Act with effect from such accounting year as may be specified in the notification, to any establishment or class of establishments including an establishment being a factory within the meaning of sub-clause (ii) of clause (m) of Section 2 of the Factories Act, 1948 employing such number of persons less than twenty as may be specified in the notification, so however, that the number of

1. The words "on the basis of profits or on the basis of production or productivity" appearing in the long title or preamble of the Act of 1965 after the word "establishment" and before the word "and" have been omitted by an amendment (Act No. 43 of 1977) in 1977.

2. *Jalan Trading Co.* v. *Mill Mazdoor Sabha*, AIR 1967 SC 691.

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persons so specified shall in no case be less than ten.

(4) Save as otherwise provided in this Act, the provisions of this Act shall, in relation to a factory or other establishment to which this Act applies, have effect in respect of the accounting year commencing on any day in the year 1964 and in respect of every subsequent accounting year :

Provided that in relation to the State of Jammu and Kashmir, the reference to the accounting year commencing on any day in the year 1964, and every subsequent accounting year shall be construed as reference to the accounting year commencing on any day in the year 1968 and every subsequent accounting year :

Provided further that when the provisions of this Act have been made applicable to any establishment or class of establishments, by the issue of a notification under the proviso to sub-section (3), the reference to the accounting year commencing on any day in the year 1964 and every subsequent accounting year or, as the case may be, the reference to the accounting year commencing on any day in the year 1968 and every subsequent accounting year, shall, in relation to such establishment or class of establishments, be construed as a reference to the accounting year specified in such notification and every subsequent accounting year.

(5) An establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein falls below twenty or, as the case may be, the number specified in the notification issued under the proviso to sub-section (3).

The Payment of Bonus Act cannot have retrospective operation. In *Remington Rand of India* v. *Workmen*,[1] payment of bonus for the year 1963-64 was demanded. It was held that bonus payable for that year will have to be calculated on the basis of Full Bench Formula as approved by the Supreme Court and the Act does not apply to that year retrospectively.

2. Definitions.—In this Act, unless the context otherwise requires—

(1) **Accounting year.**—"Accounting year" means :

(i) in relation to a corporation, the year ending on the day on which the books and accounts of the corporation are to be closed and balanced ;

(ii) in relation to a company, the period in respect of which any profit and loss account of the company laid before it in annual general meeting is made up, whether that period is a year or not ;

(iii) in any other case—

(a) the year commencing on the 1st day of April ; or

(b) if the accounts of an establishment maintained by the employer thereof are closed and balanced on any day other than the 31st day of March, then, at the option of the employer, the year ending on the day on which its accounts are so closed and balanced :

Provided that an option once exercised by the employer under paragraph (b) of this sub-clause shall not again be exercised except with the previous permission in writing of the prescribed authority and upon such conditions as that authority may think fit.

(2) **Agricultural income.**—"Agricultural income" shall have the same meaning as in the Income-tax Act.

(3) **Agricultural Income-tax law.**—"Agricultural income-tax law" means any law for the time being in force relating to the levy of tax on agricultural income.

(4) **Allocable surplus.**—"Allocable surplus" means—

1. AIR 1970 SC 1421.

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(a) in relation to an employer, being a company other than a banking company which has not made the arrangements prescribed under the Income-tax Act for the declaration and payment within India of the dividends payable out of its profits in accordance with the provisions of Section 194 of that Act, sixty-seven per cent of available surplus in an accounting year ;

(b) in any other case, sixty per cent of such available surplus.

In *Maharashtra Veej Mandal Kamgar Sangh* v. *Maharashtra State Electricity Board and others*,[1] it was held that Income Tax Officer is the competent authority to determine the correct amount of depreciation allowable under the Income Tax Act subject to any appeal or revision from his order. Therefore in the absence of any challenge to the correctness of that order and in the absence of either party contending that the correct amount of depreciation is other than that allowed by the I.T.O., one fails to see why that amount should not be regarded as correct. Therefore the Tribunal would be correct in accepting the amount of depreciation allowed by I.T.O. in calculating the allowable surplus under the Payment of Bonus Act.

(5) **Appropriate government.**—"Appropriate government" means—

(i) in relation to an establishment in respect of which the appropriate Government under the Industrial Disputes Act, 1947 is the Central Government, the Central Government ;

(ii) in relation to any other establishment, the Government of the State in which that other establishment is situate.

(6) **Available surplus.**—"Available surplus" means the available surplus computed under Section 5.

(7) **Award.**—"Award" means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947, or by any other authority constituted under any corresponding law relating to investigation and settlement of industrial disputes in force in a State and includes an arbitration award made under Section 10-A of that Act or under that law.

(8) **Banking company.**—"Banking company" means a banking company as defined in Section 5 of the Banking Companies Act, 1949, and includes the State Bank of India, any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959, any corresponding new Bank specified in the first Schedule to the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, any corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, any Co-operative Bank as defined in clause b(ii) of Section 2 of the Reserve Bank of India Act, 1934, and any other banking institution which may be notified in this behalf by the Central Government.

In *Corporation Employees' Co-operative Bank Ltd.* v. *Co-operative Bank Employees' Union*,[2] a co-operative society was carrying on banking business. Section 2(8) defines a banking company as including any Co-operative Bank. Item 2 Schedule III applied to an employer which is a banking company and item 4 applied to an employer which is a co-operative society. In this case Co-operative Bank being a banking company item 2 of Schedule III is specifically applicable and not the mere general category of co-operative society specified in item 4.

(9) **Company.**—"Company" means any company as defined in Section 3 of the Companies Act, 1956, and includes a foreign company within the meaning of Section 591 of that Act.

1. 1988 II Lab LJ 134 (Bombay).
2. (1984) I LLJ 207 (Bom).

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(10) Co-operative society.—"Co-operative society" means a society registered or deemed to be registered under the Co-operative Societies Act, 1912, or any other law for the time being in force in any State relating to co-operative societies.

(11) Corporation.—"Corporation" means any body corporate established by or under any Central, Provincial or State Act but does not include a company or a co-operative society.

(12) Direct tax.—"Direct tax" means—

(a) any tax chargeable under—

(i) the Income-tax Act ;

(ii) the Super Profit Tax Act, 1963 ;

(iii) the Companies (Profits) Surtax Act, 1964 ;

(iv) the Agricultural Income-tax law ; and

(b) any other tax which, having regard to its nature or incidence, may be declared by the Central Government, by notification in the Official Gazette, to be a direct tax for the purpose of this Act.

(13) Employee.—"Employee" means any person (other than an apprentice) employed on a salary or wage not exceeding three thousand and five hundred rupees per mensem in any industry to be any skilled or unskilled manual, supervisory, managerial administrative, technical or clerical work for hire or reward, whether the terms of employment be express or implied.

A person who is regularly employed for doing a regular work of sweeping is an employee and not a casual worker even though he is a part-time worker.[1]

(14) Employer.—"Employer" includes—

(i) in relation to an establishment which is a factory, the owner or occupier of the factory, including the agent of such owner or occupier, the legal representative of a deceased owner or occupier and where a person has been named as a manager of the factory under clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948, the person so named ; and

(ii) in relation to any other establishment, the person who or the authority which, has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent.

A person in order to be an employer need not be a manager. Chairman or director of a company having control over the affairs of establishment is an employer.[2]

(15) Establishment in private sector.—"Establishment in private sector" means any establishment other than an establishment in public sector.

(16) Establishment in public sector.—"Establishment in public sector" means an establishment owned, controlled or managed by—

(a) a Government company as defined in Section 617 of the Companies Act, 1956 ;

(b) a corporation in which not less than forty per cent of its capital is held (whether singly or taken together), by—

(i) the Government ; or

(ii) the Reserve Bank of India ; or

(iii) a corporation owned by the Government or the Reserve Bank of India.

An establishment engaged in any industry carried on by or under the authority of any department of Central Government or State Government is not establishment in

1. (1970) All WR (HC) 742.
2. (1970) Lab IC 504.

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public sector.[1]

(17) Factory.—"Factory" shall have the same meaning as in clause (m) of Section 2 of the Factories Act, 1948.

(18) Gross profits.—"Gross profits" means the gross profits calculated under Section 4.

In the case of companies other than a banking company gross profits under Section 4 are to be computed in the manner laid down in the Second Schedule. The Schedule requires adding back to the net profits shown in the P. & L. account the amount of depreciation deducted in that account while computing gross profits. Obviously, the depreciation so to be added back is the one worked out by the company under Section 205(2) of the Companies Act for the purpose of distribution of dividend under Section 205(1) of that Act. Section 6 provides that having arrived at the gross profits under Section 4 read with the Second Schedule the company is entitled to deduct therefrom depreciation admissible under Section 32(1) of the Income Tax Act, that is such percentage on the written down value as may, in the case of each of the classes of assets, be prescribed.[2]

Interest paid by one office of the company to its another office on advances received from that office has to be disallowed in calculating gross profit of the office even if such expenditure is accepted as a proper expenditure by auditors. Presumption under Section 23 of the Act is not available to justify such deduction.[3]

An adjudication and an award for bonus which is based exclusively on the provisions of the Act has to be done in accordance with the provisions laid down therein. After ascertaining the gross profits it is duty of the Tribunal to work out the available allocable surplus in accordance with the provisions of the Act. The calculation of the amount of gross profits should not be a gross work but must be based on relevant materials.[4]

(19) Income-tax Act.—"Income-tax Act" means the Income-tax Act, 1961.

(20) Prescribed.—"Prescribed" means prescribed by rules made under this Act.

(21) Salary or wage.—"Salary or wage" means all remuneration (other than remuneration in respect of over-time work) capable of being expressed in terms of money, which would, if the terms of employment express or implied were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowance (that is to say, all cash payment, by whatever name called, paid to an employee on account of a rise in the cost of living), but does not include :

(i) any other allowance which the employee is for the time being entitled to ;

(ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles ;

(iii) any travelling concession ;

(iv) any bonus (including incentive, production and attendance bonus) ;

(v) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force ;

(vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any *ex-gratia* payment made to him ;

1. (1970) 2 Lab LJ 450.
2. *Metal Box Company of India Ltd.* v. *Their Workmen*, AIR 1969 SC 612.
3. *Workmen W.J. & Co.* v. *W.J. & Co.*, AIR 1971 SC 1821.
4. *S.B. Stores* v. *Industrial Tribunal U.P.*, AIR 1972 SC 1902.

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(vii) any commission payable to the employee ;

Explanation.—Where an employee is given in lieu of the whole or part of the salary or wage payable to him, free food allowance or free food by his employer, such food allowance or the value of such food shall, for the purpose of this clause, be deemed to form part of the salary or wage of such employee.

Bonus payable to an employee is wages and is not liable to attachment.[1] Special allowances in terms of Sastri's Award and Desai's Award go along with the posts and are not temporary allowances payable to particular employees for a particular period. Consequently, the special allowances payable to Bank employees do not come within the scope of the first exception to 'salary or wage' in Section 2(21).[2]

In *Gopalan* v. *Angamali Chit Fund*,[3] it was pointed out that it is true that the definition of wages does not include bonus, but that it is because for the purpose of the Act bonus has to be distinguished from wages and has to be determined in relation to the wages paid to the employee. The fact that bonus is specifically excluded from the definition of wages in Section 2(21) of the Act itself signifies that but for such exclusion bonus would fall under "wages".

In *Chalthan Vibhag Sahkari Khand Udyog* v. *Government Labour Officer and others*,[4] the question was, whether the retaining allowance paid by the sugar industry to its seasonal employees for the off season period is to be taken into account in calculating bonus payable to such seasonal workmen by the sugar industry. It was held that retaining allowance is remuneration which would, if the terms of employment express or implied were fulfilled, be payable to any employee, in respect of his employment. The retainer allowance is a remuneration, on a lower scale, which is paid to the workmen by management during the off season for their forced idleness. The payment of such allowance is indicative of the fact that the management wants to retain their services for the next crushing season. The very fact that the retaining allowance is paid to the workmen clearly shows that their services are retained, therefore, the jural relationship of employer and employee continues. Therefore, retainer allowance being a remuneration is covered by the definition of salary or wage, in Section 2(21) of the Act. It is not within the purview of Clause (i) of the exclusionary clause of Section 2(21).

In *S. Krishnamurthy* v. *Presiding Officer, Central Government, Labour Court Madras*,[5] city compensatory allowance was paid to workmen of bank pursuant to a settlement between the workmen and the management which provided that such allowance paid would be taken into account in its entirety for those who joined service between 1 January, 1970 and 31 July, 1970. There is no specific provision that in the case of other employees city compensatory allowance should not be taken into account. In a claim for bonus on the city compensatory allowance it was held that city compensatory allowance is an allowance attached to the post and therefore it is not an allowance paid for the time being only as has been said by the Labour Court. Even if there is an agreement excluding city compensatory allowance being taken into account for the purpose of calculation of bonus, such an agreement would be contrary to the provisions of the Payment of Bonus Act. Hence city compensatory allowance has to be taken into account for the purpose of calculating of bonus as it is included in the definition of "salary or wages". It was further held that the agreement between the parties is not an agreement for payment of bonus under a different formula from the one under the Act. There is no provision in the agreement regarding payment of bonus.

1. (1970) 1 LLJ 697 (AP).
2. (1970) 2 LLJ 91 (Mad).
3. AIR 1977 Ker 120.
4. (1981) 1 LLJ 450 (SC).
5. (1986) 1 LLJ 133 (SC).

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It cannot be read that the agreement imply that in the case of other employee who did not join service between January, 1970 and 31 July, 1970, city compensatory allowance was not to be taken into account.

(22) Words not defined.—Words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947, shall have the meaning respectively assigned to them in that Act.

3. Establishment to include department, undertakings and branches.—Where an establishment consists of different departments or undertakings or has branches, whether situated in the same place or in different places, all such departments or undertakings or branches shall be treated as parts of the same establishment for the purpose of computation of bonus under the Act :

Provided that where for any accounting year a separate balance-sheet and profit and loss account are prepared and maintained in respect of any such department or undertaking or branches, then such department of undertaking or branch shall be treated as a separate establishment for the purpose of computation of bonus under this Act for that year, unless such department or undertaking or branch was, immediately before the commencement of that accounting year treated as part of the establishment for the purpose of computation of bonus.

The proviso to Section 3 requires a separate balance sheet and profit and loss account to be prepared and maintained in respect of a department or undertaking or branch of a company and once it is established the department, undertaking or branch will be treated as a separate establishment for the purpose of computation of bonus. The proviso to Section 3 does not require the accounts to be maintained on a particular footing by the parent company or under the orders of parent company. It merely provides for the maintenance of separate accounts and for maintenance of separate accounts on a specific footing.

In *K.C.P.E. Association, Madras* v. *K.C.P. Ltd.*,[1] the respondent was public limited company carrying on three business adventures, *viz.*, manufacture of sugar, of cement and of heavy engineering machinery situated in three different places in South India and employing workmen on different terms in three different units. Engineering unit was at Madras. When the Payment of Bonus Act, 1965 came into force the workmen of Engineering unit, which was financially faring ill unlike the other two sister units, demanded bonus on the footing that the three different units must be treated as one composite establishment and on the basis of the overall profits bonus must be reckoned as provided in the Act. The respondent's case was that the Engineering unit was a separate undertaking to which the proviso to Section 3 applied, consequently the claim for the bonus on the basis of a single establishment was untenably over-ambitious. The Supreme Court held that the workmen of the Engineering Unit could not claim bonus on the basis of single establishment and proviso to Section 3 was attracted. Separate balance sheet and profit and loss accounts of the Engineering Unit have been prepared and maintained in the past and during the relevant years of accounting also, although there is much force in the contention that they have not been properly maintained.

When certain new units of an establishment have each been treated separately and each of them is having a separate balance sheet and profit and loss account, they cannot be treated as part of that establishment for purposes of computation of bonus.[2]

In *Vegoils (P) Ltd.* v. *N.G. Chitale & others*,[3] the Bombay H.C. examined Section 3 of this Act and held that there is no requirement in Section 3 that in the accounts of

1. AIR 1978 SC 474.
2. *Workmen H.M.T.* v. *Presiding Officer, National Tribunal, Calcutta*, AIR 1973 SC 2300.
3. (1979) 2 LLJ 313 (Bom).

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the parent company or in the directors' report there should be any statement that accounts were being separately kept of a particular department, undertaking or branch. As a matter of fact even if such a statement is to be found but it is ascertained that in fact the accounts were not being separately maintained, the employer will not be entitled to the benefit of the proviso. Conversely, if it is ascertained that the accounts of the Department, undertaking or branch are being separately and properly maintained, the absence of such statement will not disentitle the employer from contending that the bonus should be calculated on the basis of these separate accounts.

In *Workmen of Modern Mills* v. *General Manager*,[1] the petitioners are the workmen of Modern Mills Ltd. Prior to amalgamation of Sundatta Food and Fibre Division with Modern Mills Ltd. the former company was functioning as a separate legal entity and the petitioners were workmen of Sundatta Company. The amalgamation took place on 12th October, 1977. The order of amalgamation provided that the assets and liabilities of Sundatta Company had been transferred to the Modern Mills on the appointed date *i.e.*, 1, January, 1976. The accounting year of Sundatta Company which was calendar year stood altered to 'April to March' in consonance with the accounting year of Modern Mills Ltd. 20% Bonus was paid to the Workmen of Sundatta Company for the calendar year 1976 on the trading results of the company. The petitioners accepted under protest the bonus at a lesser rate and raised a dispute claiming bonus at the rate of 20% *i.e.*, the maximum possible under the Act. The respondent contended that bonus paid under the settlement was on the basis of the consolidated balance sheet of Modern Mills and that the available surplus which was worked out on the basis of the consolidated balance sheet did not permit the management to pay more than 8.33%. This contention was based on the fact that though Sundatta Company was making considerable profits, Modern Mills was incurring heavy losses and therefore the overall performance of the Modern Mills also included the trading result of Sundatta Company. It was held that in this case the evidence is that Sundatta Company was maintaining a trial balance sheet upto the extent of 75% and the rest of the figures were audited in Bombay for the purpose of preparing the final balance sheet and those figures are only in relation to Bombay office expenses and not the trading results of Sundatta Company at Hubli. Therefore, *prima facie* the first proviso to Section 3 is attracted in this case unless the management proves that it had treated Sundatta Company immediately before the commencement of the accounting year as part of Modern Mills for the purpose of computation of bonus. Hence the petition was allowed and the matter was remitted to the Industrial Tribunal with a direction to consider the claims of the petitioners for bonus in the light of the above observations.

In *The Workmen of Messrs Binny Ltd.* v. *The Management of Binny Ltd.*,[2] the company acquired interest in various other companies. The undertakings of six companies were amalgamated with Binny Ltd., formed on 30th June, 1969 and it commenced business on 1st November, 1969. The employees of amalgamating companies have become the employees of the newly formed company. The Scheme of amalgamation *inter alia* provided that a separate profit and loss account would be prepared for each of the amalgamating company for the financial year 1969 and the scheme of amalgamation was sanctioned without prejudice to the rights of the employees of Binny Ltd., to work out their rights under Payment of Bonus Act against the new company during financial year 1969. The new company declared and paid the minimum bonus of 4% to the employees of all the six amalgamating companies on the basis of a consolidated profit and loss account. Employees of Binny & Co. Ltd. who were getting maximum bonus of 20% till then claimed to receive the same maximum

1. (1986) 2 Lab LJ 329 (Karnataka).
2. (1985) 2 Lab LJ 564 (SC).

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bonus on the basis of separate profit and loss account of their erstwhile employer. On a reference to Industrial Tribunal, Madras the claim of employees was rejected by the Tribunal on the ground that no separate balance sheet was prepared by the erstwhile Binny & Co. Ltd. It was held that if a separate balance sheet had been prepared the employees would have been entitled to maximum bonus. Therefore, it could be that separate balance sheet was not prepared to avoid payment of bonus at a higher rate. Refusal to prepare a balance sheet when profit and loss accounts and Trial Balance Sheet are available without any valid reason amounts to denial of employees to their dues. In such a situation the Tribunal can direct the employer company to prepare a balance sheet. Employees cannot be denied bonus merely because separate balance sheet was not prepared for their unit when all the materials are available for preparation of such a balance sheet.

4. Computation of gross profits.—The gross profits derived by an employer from an establishment in respect of the accounting year shall—

(a) in the case of banking company, be calculated in the manner specified in the First Schedule.

(b) in any other case, be calculated in the manner specified in the Second Schedule.

In *Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar* v. *Associated Rubber Industry Ltd., Bhavnagar and another*,[1] the Associated Rubber Industry Ltd., (ARI) purchased shares in INARCO Ltd., Dividends received by ARI were shown in the profit and loss account of the company and the same was taken into account for calculating the bonus payable to the workmen. Subsequently ARI transferred the shares of INARCO Ltd., to Aril Holdings Ltd., (AHL) a wholly owned subsidiary of ARI. The only capital of AHL is the shares of INARCO Ltd. Its only source of income is the receipt of the dividend on the said shares of INARCO Ltd. For the year 1969, ARI paid bonus at the rate of 4% to its workmen instead of at the rate of 16% to which they are entitled. During 1971 AHL was amalgamated with ARI and was wound up. The workmen of ARI demanded bonus at the rate of 16% for the year 1969 on the plea that the transfer of shares by INARCO to AHL was a device to avoid the payment of bonus. It was held that AHL has no business or income of its own except receiving dividends on shares transferred and served no purpose except to reduce the gross profits of ARI. It has no assets of its own excepting the transferred shares of INARCO. No reason has been shown as to why AHL was created and later on woundup. ARI and AHL were distinct legal entities having separate existence but it is evident that the obvious purpose of creating AHL as a subsidiary company was to reduce the amount to be paid by way of bonus to workmen. The amount of dividend of INARCO Ltd. received by AHL was, therefore, held to be taken into account in assessing the gross profits of ARI Ltd., for the purpose of calculating the rate of bonus payable to the workmen of ARI Ltd. They are thus entitled to be paid bonus at the rate of 16% for the year 1969.

In *All India Voltas and Volkart Employees Federation* v. *Voltas Ltd., and another*,[2] the company paid to its employees certain amounts during 1964-65 and 1965-66 under a "Superannuation Special Retired Gratuity Scheme". The workmen claimed that the amounts paid under the aforesaid scheme should be added back as bonus paid to its employees in respect of previous accounting years for the purpose of computing gross profits under the Act. It was held that the scheme framed by the company was a scheme for payment of bonus though named differently. The employees who have joined this scheme have expressly stated in writing not to participate in the annual bonus since the

1. (1986) 1 Lab LJ 142 (SC).
2. (1985) 2 Lab LJ 409 (SC).

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Special Retiring Gratuity Scheme was in lieu of annual bonus. The scheme was devised in 1959 to reduce the liability of income-tax. Amount paid by the company under the scheme have, therefore, to be added back for the purpose of computing the gross profit. The matter was, therefore, remitted back to the Tribunal for appropriate orders in the light of the judgment.

5. Computation of available surplus.—The available surplus in respect of any accounting year shall be the gross profit for that year after deducting therefrom the sums referred to in Section 6 :

Provided that the available surplus in respect of the accounting year commencing on any day in the year 1968 and in respect of every subsequent accounting year shall be the aggregate of—

(a) the gross profits for that accounting year after deducting therefrom the sums referred to in Section 6 ; and

(b) an amount equal to the difference between—

(i) the direct tax, calculated in accordance with the provisions of Section 7, in respect of an amount equal to the gross profits of the employer for the immediately preceding accounting year, and

(ii) the direct tax, calculated in accordance with the provisions of Section 7, in respect of an amount equal to the gross profits of the employer for such preceding accounting year after deducting therefrom the amount of bonus which the employer has paid or is liable to pay to his employees in accordance with the provisions of this Act for that year.

In *Indian Oxygen Ltd.* v. *Their Workmen*,[1] it was held that in calculating the allocable surplus the tax concession by way of rebate that an employer will get under Income-tax Act on the bonus for fund to be payable, need, not be taken into consideration. Account shown as doubtful debts (and not as bad debts) is to be added back to gross profits. Similarly, capital expenditures in the nature of expenses incurred on Plant Transfer Charges, Patent fees and Rent paid for godown for storing goods, for erecting a factory are to be added back to the gross profit for the purpose of determining allocable surplus.

In *B.E. Supply Co.* v. *The Workmen*,[2] it was held by the Supreme Court that a claim for depreciation on account of double shift can be allowed even if it was not claimed under the Income-tax Act. But the working for double shift has to be proved by adducing evidence. The amount to be allowed as prior charge towards depreciation will have to be computed after allowing for the notional depreciation. The amount of income tax payable for the bonus year to be calculated after deducting the statutory depreciation and not notional normal depreciation.

In considering a claim for return on working capital two questions must be kept in view, whether the reservations were available and if they were, whether they were used on working capital and if so, what is that amount. These are questions of fact and if the employer fails to establish by satisfactory evidence the claim will have to be rejected.[3] Bases of assets of reserve for calculating working capital should be as they stood at the beginning of the bonus year and not as they stood at the end of the year.[4] The working capital cannot include fixed assets, nor the capital works in progress as it

1. *Indian Oxygen Ltd.* v. *Their Workmen*, AIR 1972 SC 471.
2. *B.E. Supply Co.* v. *The Workmen*, AIR 1972 SC 330.
3. *Ibid.*
4. *Ibid.*

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represents the funds required for day-to-day running of the company.[1]

In *Binny Ltd.* v. *Workmen*,[2] it was held that rehabilitation, reserve is a substantial item which goes to reduce the available surplus and as a result affects the right of the employees to receive the bonus. Hence the employer will have to place all relevant material and the Tribunal will have to scrutinize them carefully and be satisfied that the claim is justified. If a company has no scheme for rehabilitation then of course, its claim on that head must be rejected.

In determining the claim of the employer for rehabilitation, two factors are essential to be ascertained namely, (1) the multiplier, and that has to be done by reference to the purchase price of the machinery and the price which has to be paid for rehabilitation or replacement ; and (2) the determination of the diviser and that has to be done by deciding the probable life of the machinery. Mere production of balance sheet and profit and loss accounts by themselves will not entitle an employer to sustain its claim for rehabilitation.[3]

In allocating the available surplus between the company and the workmen, it will be equitable if roughly 60 per cent of the surplus is distributed as bonus to the workmen and the company is left with the remaining 40 per cent. The company will get in addition to this 40 per cent the benefit of the income tax rebate on the 60 per cent bonus payable to the workmen.[4]

If through inefficiency in the working of the industry or by reason of use of defective machinery or apparatus full profits are not received with the result that notionally the labour is deprived of a share thereof the tribunal adjudicating on the question of bonus payable to labour for particular year cannot add back to the gross profits as shown in the balance sheet the amount of profit lost through the inefficiency or negligence of the employers.[5]

Though statutory contingency reserve and statutory development reserve cannot be considered as prior charges for finding out available surplus, they have to be taken into account while the question of distribution of available surplus to workers arises.[6]

In computation of available surplus the following sums are deductible from gross profits :

(1) If there is a discrepancy in different statement of account with regard to particular item of expenditure and the employer fails to explain it, the difference should be totalled up with the gross profits.[7]

(2) Employer is entitled to deduct his tax liability without deducting first the amount of bonus, he would be liable to pay from and out of the amount computed under Sections 4 and 6.[8]

Where the interest accrued to the company out of the statutory investments included in the statement of net profits for purpose of calculating remuneration of the Managing Agents the same can be treated as available surplus.[9]

Rebate to consumers though not actually paid by a company, the amount so accumulated cannot be treated as available surplus.[10]

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1. *Binny Ltd.* v. *Workmen*, AIR 1973 SC 353.
2. *Ibid.*
3. *Ibid.*
4. *Ibid.*
5. *U.P. Elec. Supply Co.* v. *The Workmen*, AIR 1971 SC 2521.
6. *Ibid.*
7. *J.B.K. Panchayat* v. *J.E. Supply Co.*, AIR 1972 SC 70.
8. *Indian Cable Co.* v. *Workmen*, AIR 1972 SC 2195.
9. *J.B.K. Panchayat* v. *J.E. Supply Co.*, AIR 1972 SC 70.
10. *Ibid.*

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Advances not made in the course of business transactions of a nature as would form part of working capital, have to be treated as part of capital assets in calculation of available surplus.[1]

In *N.I. & S. Co.* v. *Workmen*[2] the evidence showed that 24.67 per cent of the iron rods examined by the witness were underweight. On the basis of the evidence, the Tribunal assumed that 24.67 per cent of the total production of rods were underweight and that the sale proceeds thereof could be deemed not to have been brought into the profit and loss account. It was held that the Tribunal was in error. The Tribunal in such a case, should have found out the exact extent of the deviation in weight.

Commission received by Indian subsidiary company from parent company incorporated in a foreign country on sales effected by the latter through Indian High Commission located there or on orders received by it directly from the Indian importers as well as royalties received out of sales made by the Parent Company to the foreign countries can be deducted while computing available surplus.[3] Return on share premium can be deducted but donations cannot be deducted while computing available surplus.[4]

Where the company did not rest its claim for deduction of return on reserves employed as working capital merely on statement of profit and loss but examined its Deputy Accountants and the Chartered Accountant or the auditors of the company to use of reserves as claimed that they were not cross-examined by union on those matters, the returns claimed could be validly allowed to be deducted.[5]

6. Sum deductible from gross profits.—The following sums shall be deducted from the gross profits as prior charges, namely—

(a) any amount by way of depreciation admissible in accordance with the provisions of sub-section (1) of Section 32 of the Income Tax Act or in accordance with the provisions of the Agricultural Income-tax Law as the case may be :

Provided that where an employer has been paying bonus to his employees under a settlement or an award or agreement made before the 29th May, 1965, and subsisting on that date after deducting from the gross profits notional normal depreciation, then, the amount of depreciation to be deducted under this clause shall, at the option of such employer (such option to be exercised once and within one year from that date) continue to be such notional normal depreciation ;

(b) any amount by way of employment rebate or investment allowance or development allowance which the employer is entitled to deduct from his income under the Income-tax Act ;

(c) subject to the provisions of Section 7, any direct tax which the employer is liable to pay for the accounting year in respect of his income, profits and gains during that year ;

(d) such further sums as are specified in respect of the employer in the Third Schedule.

Under Section 6, clause (a) the permissible deduction from the gross profits is not depreciation calculated according to any recognised method of accountancy followed by a banking company, but only such depreciation as is admissible in accordance with the provisions of Section 32(1) of the Income-tax Act.[6]

1. *Gannon Dunkerely & Co.* v. *Workmen*, AIR 1971 SC 2567.
2. AIR 1973 SC 2354.
3. *Workmen* v. *Dunlop Rubber Co.*, AIR 1973 SC 2394.
4. *Ibid.*
5. *Ibid.*
6. *Workmen N.G. Bank* v. *N.G. Bank*, AIR 1976 SC 611.

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In *Workmen N.G. Bank* v. *N.G. Bank*,[1] the Bank claimed the deduction of depreciation at a figure higher than that appearing in the profit and loss account. It was held that the burden of proving that the depreciation claimed by it was the correct amount of depreciation, admissible under Section 32(1) of the Income-tax Act was on the Bank and that burden has to be discharged by the Bank by producing proper and satisfactory evidence.

It was further held that the calculation of the depreciation, in accordance with method specified in Section 32(1) of the Income-tax Act, has to be done by the Tribunal in the exercise of its *quasi* judicial duty. The Tribunal should not blindly accept the figure of depreciation arrived at by another authority charged with the function of determining depreciation under a different statute. The determination of depreciation under Section 32(1) of the Income-tax Act can be taken into account as evidence only if there is some provision of law which provides to that effect.[2]

Interest earned by company on loans advance on personal security being an extraneous income in which workmen made no contribution is deductible from gross income but only after setting off the interest paid on loans by the company.[3] In absence of any clause that income accruing from trade investments is extraneous income earned from activities in which workmen made no contribution, the income is not deductible from gross profit.[4] Entries in registers produced by company showing original cost of buildings should be accepted when there is evidence to show that the registers were kept in regular course of business.[5] Amount provided for doubtful debt are not deductible from gross profits.[6]

Claim for rehabilitation grant for machinery should not be rejected merely for failure to prove multiplier.[7] In case of a claim for rehabilitation grant, divisors should be worked out only after estimating correctly life of machinery and while calculating the grant the depreciation reserve must be deducted even if it is not available in a liquid asset.[8] As rehabilitation reserve is a substantial item which goes to reduce the available surplus and as a result affects the right of the employee to receive the bonus, the employer will have to place all relevant material and the Tribunal will have to scrutinise these carefully and be satisfied that the claim is justified. At the same time it is equitable also in the larger interest of the industry as well as of the employees that proper rehabilitation reserve should be built up taking into consideration the increase in price in plant and machinery which has to be replaced at a further date and by the determination of a multiplier and its divisor.[9]

In *Firestone Tyre Employees Union (now known as Modistone Tyre Employees Union)* v. *S.A. Patil & another*,[10] the question was whether in computing allocable surplus for calculation of bonus, the reserves created as a consequence of revaluation of assets would be entitled to statutory deduction under the Act. It was held that the Tribunal was right in holding that the reserves created as a result of revaluation of assets were reserves properly created and entitled to the statutory deduction. In allocation of surplus between company and workmen court cannot take into account also bonus paid to officers at the same rate as awarded to workmen under an industrial dispute. In the

1. AIR 1976 SC 611.
2. *Ibid.*
3. *Gannon Dunkerley and Co.* v. *Workmen*, AIR 1971 SC 2567.
4. *Ibid.*
5. *Ibid.*
6. *Indian Cable Co.* v. *Workmen*, AIR 1972 SC 2195.
7. *Gannon Dunkereley & Co.* v. *Workmen*, AIR 1971 SC 2567.
8. *Ibid.*
9. *B.E. Supply Co.* v. *The Workmen*, AIR 1972 SC 330.
10. (1993) 1 LLJ 426 (Bom).

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absence of any specific agreement officers cannot claim bonus on the same basis as workmen.[1]

In computation of working capital, depreciation should be calculated according to the rules framed under the Income-tax Act not in accordance with Schedule VII of the Electricity Supply Act, 1948.[2] The employer is entitled to deduct from the gross profits as computed under Section 4, depreciation under Section 6(a) in accordance with Section 32(1) of the Income-tax Act and under Section 6(d) such further sums as are specified in the Third Schedule to the Bonus Act.[3]

In calculating income tax deductible in working out the gross profit the bonus which would be payable under the Act should not be taken into account.[4]

Sums paid by employer under *bona fide* Voluntary Retirement Scheme, for extra shift allowance and for repairs and renewals, are deductible as capital expenditure and cannot be added back to gross profit of the employer.[5]

Where a company owns and runs different factories turning out commercial products of diverse character and it is ascertained that each unit comes within the proviso to Section 3 and is an establishment by itself the liability for direct tax under Section 6(c) must be the one which would have to be computed by principles followed in the Income-tax Act. In other words the liability under Section 6(c) must be the notional liability of a venture of which the gross profits are known and the prior charges by way of depreciation and development rebate and development allowance have been computed.[6]

Any amount in the hands of the undertaking liable to be returned to the consumers as rebate cannot be taken into account in computing the gross profits of the undertaking. It has to be deducted before profit could be computed for payment of bonus.[7] While calculating available surplus the amount appropriate as development reserve for that accounting year is alone to be considered. The appropriate development reserve for the earlier years which could not be appropriated for non-availability of sufficient fund could not be taken into consideration.[8] Payable bonus should not be subtracted from gross profits.[9]

Item 2 of the Third Schedule of the Act refers to banking company and item 4 to co-operative society. It was held in *Vellore Central Co-operative Bank Ltd.* v. *Industrial Tribunal, Madras and others*,[10] that for the purposes of Bonus Act "Co-operative Bank" is distinct and different from "co-operative society" even though it is registered under the Co-operative Societies Act. For the purpose of deduction Section 6(d) of the Payment of Bonus Act which refers to the Third Schedule the co-operative bank has to be treated as banking company under item 2 only and not a co-operative society under item 4 or both under items 2 and 4. The provisions of the Payment of Bonus Act are clear and unambiguous and therefore there is no need to call in aid the provisions of other enactments, either for understanding or for applying the provisions of the Act.

7. Calculation of direct tax payable by the employer.—Any direct tax payable by the employer for any accounting year shall, subject to the following provisions, be

1. *I.L.C. Manufacturers* v. *Workmen*, AIR 1972 SC 343.
2. *Gannon Dunkerley & Co.* v. *Workmen*, AIR 1971 SC 2567.
3. *J.B.K. Panchayat* v. *J.E. Supply Co.*, AIR 1972 SC 70.
4. *Workmen W.J. & Co.* v. *W.J. & Co.*, AIR 1971 SC 1821.
5. *Indian Cable Co.* v. *Workmen*, AIR 1972 SC 2195.
6. *D.C. & G. Mills* v. *Their Workmen*, AIR 1972 SC 299.
7. *Workmen* v. *Management S.E. Supply Co.*, AIR 1973 SC 2766.
8. *Ibid.*
9. *Indian Oxygen Ltd.* v. *Their Workmen*, AIR 1972 SC 471.
10. (1989) 2 Lab LJ 435 (Mad).

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calculated at the rates applicable to the income of the employer for that year, namely—

(a) in calculating such tax no account shall be taken of—

(i) any loss incurred by the employer in respect of any previous accounting year and carried forward under any law for the time being in force relating to direct taxes ;

(ii) any arrears of depreciation which the employer is entitled to add to the amount of the allowance for depreciation for any of the following accounting year or years under sub-section (2) of Section 32 of the Income-tax Act ;

(iii) any exemption conferred on the employer under Section 84 of the Income-tax Act or of any deduction to which he is entitled under sub-section (1) of Section 101 of that Act, as in force immediately before the commencement of the Finance Act, 1965.

(b) where the employer is a religious or a charitable institution to which the provisions of Section 32 do not apply and the whole or any part of its income is exempt from tax under the Income-tax Act, then, with respect to the income so exempted, such institution shall be treated as if it were a company in which the public are substantially interested within the meaning of that Act ;

(c) where the employer is an individual or a Hindu undivided family, the tax payable by such employer under the Income-tax Act shall be calculated on the basis that the income derived by him from the establishment is his only income ;

(d) where the income of any employer includes any profits and gains derived from the export of any goods or merchandise out of India and any rebate on such income is allowed under any law for the time being in force relating to direct taxes, then, no account shall be taken of such rebate ;

(e) no account shall be taken of any rebate (other than development rebate or investment allowance or development allowance) or credit or relief or deduction (not hereinbefore mentioned in this section) in the payment of any direct tax allowed under any law for the time being in force relating to direct taxes or under the relevant annual Finance Act, for the development of any industry.

Section 7 of the Act shows that matters extraneous to the working of the establishment in the particular year were not to be taken into account although they could not be ignored for computing tax liability under the Income-tax Act.[1]

The 'rebate of relief' in the payment of any direct tax in order to fall within the purview of Section 7(e) of the Act must satisfy two conditions, *viz.*, (i) that it must be a rebate or relief "allowed under any law for the time being in force relating to direct taxes or under the relevant annual Finance Act" and further (ii) that it must be a relief or rebate for the development of any industry.[2]

8. Eligibility for bonus.—Every employee shall be entitled to be paid by his employer in an accounting year, bonus in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year.

It was held in *Project Manager, Ahmedabad Project, O.N.G.C. Sabarmati* v. *Sham Kumar Sahegal (Died) by his Legal Representatives*[3] that when an employee is

1. *D.C. & G. Mills* v. *Their Workmen*, AIR 1972 SC 299.
2. *A.H. & Co.* v. *Engineering Mazdoor Sangh*, AIR 1975 SC 946.
3. (1995) 1 LLJ 863 (Guj).

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suspended, it cannot be said that such an employee did not work for the establishment. The word "worked" in Section 8 of the Act should mean "ready and willing to work". Therefore when an employee is prevented from working by an overt act on the part of the employer, which is ultimately set aside and the employer is reinstated in service then the reasonable inference is that the employees' statutory eligibility for bonus within the meaning of Section 8 of the Act cannot be said to have been lost. Nor can the employer refuse to accede to the demand for such bonus if it is otherwise payable under the provisions of the Act.

9. Disqualification for bonus.—Notwithstanding anything contained in this Act, an employee shall be disqualified from receiving bonus under this Act, if he is dismissed from service for—

(a) fraud ; or

(b) riotous or violent behaviour while on the premises of the establishment ; or

(c) theft, misappropriation or sabotage of any property of the establishment.

In *Himalaya Drug Co. Makali* v. *II Additional Labour Court, Bangalore*,[1] some of the workmen who were dismissed for misconduct in October 1980 claimed bonus for the accounting year ending 31st March, 1980. The Management denied their claim on the ground that they were dismissed for misconduct mentioned in Section 9 and, therefore, were disqualified from claiming bonus. It was held that if a dispute regarding bonus for 3 consecutive accounting years is pending under Section 22 of the Act, and the workman is dismissed for misconduct during the third accounting year, it is not proper to extend the scope of Section 9 to the earlier two accounting years in which the workmen had a clean record of service and during which period he did not incur any disqualification as provided under Section 9 of the Act. Alternatively, if the workman commits misconduct during the accounting year 1983-84 and if he continues to work during subsequent accounting year 1984-85 and is dismissed at the end of subsequent year, he cannot lose the bonus for accounting year 1984-85. Hence the omission of the words 'accounting year' in Section 9 does not mean that the legislature had the intention of disqualifying the workman from claiming bonus for all the previous years or year preceding the accounting year in question or year/years succeeding the accounting year. Section 9 should be construed harmoniously so that it should not conflict with other beneficial provisions of the Act.

When Section 31-A was inserted in 1976 with effect from 25th September, 1975 the Legislature must be deemed to have in view the non-obstante clause in Section 9 and therefore the later non-obstante clause in Section 31-A overrides earlier clause in Section 9. Hence the right of the management to forfeit bonus on the ground that the workman was dismissed from service for misconduct, more particularly mentioned in Section 9 of the Act, would be only with reference to the accounting year in which the said act of misconduct was committed and not with reference to any year or years preceding or succeeding in the accounting year in question.[2]

In *M/s. Sriram Bearings Limited* v. *The Presiding Officer, Labour Court, Ranchi & others*,[3] a view contrary to that expressed by Karnataka High Court in *Himalaya Drug Co. Makali* v. *II Additional Labour Court, Bangalore*,[4] has been expressed. It was held that the provisions of Section 9 of the Payment of Bonus Act cannot be given a restricted meaning and the words "an employee shall be disqualified from receiving bonus under the Act" cannot be read so as to mean that the employee shall be disqualified from receiving the bonus of the accounting year only in which he is

1. (1986) 2 Lab LJ 45 (Karnataka).
2. *Ibid.*
3. (1986) 2 Lab LJ 459 (Patna).
4. (1986) 2 Lab LJ 45 (Karnatka).

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dismissed because such disqualification is dependent only upon the order of dismissal from service. No such restriction in Section 9 has been put by the Legislature. Therefore, if an employee is dismissed from services, he stands disqualified from receiving any bonus under the Act and not the bonus only of the accounting year.[1]

10. Payment of minimum bonus.—Subject to the other provisions of this Act, every employer shall be bound to pay to every employee in respect of the accounting year commencing on any day in the year 1979 and in respect of every subsequent accounting year, a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees, whichever is higher, whether or not the employer has any allocable surplus in the accounting year :

Provided that where an employee has not completed fifteen years of age at the beginning of the accounting year, the provisions of this section shall have, effect in relation to such employee as if for the words "one hundred rupees", the words "sixty rupees" were substituted.

The statutory bonus of eight and one third per cent shall be payable whether there are profits in the accounting year or not. After coming into force of this Act, bonus has become an implied term of employment not dependant upon the profits.[2] Employees are entitled to festival bonus only if there is an implied agreement or it is paid as customary bonus.[3]

The minimum bonus under the Act is a right vested in an employee under a statute. The right to minimum bonus is a statutory right which vests in the employee and no further adjudication of the right to the payment of minimum bonus is called for. It constitutes an existing statutory right. The denial of this right by the employer does not render it an industrial dispute calling for an adjudication by way of reference under Section 10 of the Industrial Disputes Act read with Section 22 of the Payment of Bonus Act. A claim for the payment of minimum bonus cannot constitute an industrial dispute within the meaning of Section 22 of the Payment of Bonus Act. However, for the enforcement of this right an employee can file an application under Section 33-C(2) of the Industrial Disputes Act.[4]

Section 10 of the Payment of Bonus Act fixes the amount of bonus payable by an employer to every employee from the allocable surplus in respect of the accounting year. The Act is confined to the 'profit-based bonus' and not to other categories of bonus which employees may be entitled to claim from an employer. The Payment of Bonus Act, thus creates a statutory right in the employees and imposed a statutory liability upon the employers covered by the Act to pay a minimum bonus.[5] In *K.M. Mani* v. *P.J. Antony*[6] it was urged that Section 10 of this Act was *ultra vires* of Article 19(1)(g) and Article 301 of the Constitution. Repelling this contention the court observed that :

> "The restriction imposed by the Bonus Act in compelling the employer to pay the Statutory minimum bonus even in years where there has been loss sustained by the management is reasonable or in public interest within the meaning of Articles 19(6) and 302. What is reasonable depends on a variety of circumstances but what is important is that the Directive Principles of State Policy in Part IV of the Constitution are fundamental to governance of the country.

1. *M/s. Shri Ram Bearings Ltd.* v. *The Presiding Officer Labour Court, Ranchi & others*, (1986) 2 Lab LJ 459 (Patna).
2. *Gopalan* v. *Angamali Chit Fund.*, AIR 1977 Ker 120.
3. *J.B.K. Panchayat* v. *J.E. Supply Co.*, AIR 1972 SC 70.
4. *Anand Oil Industries* v. *Labour Court, Hyderabad*, AIR 1979 AP 182.
5. *Ibid.*
6. AIR 1979 SC 238. *See* also *Jalan Trading Co. Pvt. Ltd.* v. *D.M. Aney*, (1979) 1 LLJ 162 (SC).

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Therefore, what is directed as State Policy by the founding fathers of the Constitution cannot be regarded as unreasonable or contrary to public interest even in the context of Article 19 or 302. It follows that payment of bonus, being in implementation of Articles 39 and 43 of the Constitution, is reasonable."

In *Dishergarh Power Supply Company Ltd. Calcutta & another* v. *The Workmen of Dishergarh Power Supply Company Ltd., and others*,[1] the workmen of two companies were paid bonus for the years 1965-66 to 1970-71 on the basis of agreement entered into under Section 34(3) of the Payment of Bonus Act. In respect of the year 1971-72 the workmen claimed bonus equivalent to 3 months basic wages as on 31st March, 1972 as customary bonus or as bonus payable under the Act. This claim was resisted by the Management and it was contended that the workmen were entitled only to minimum bonus. In consequence of conciliation the management agreed to pay as bonus an amount equal to 3 months' basic wages as on 31.3.1970 and also agreed to refer the demand for bonus for the year 1971-72 to the Tribunal for adjudication. The Tribunal found that there was no case for bonus as customary payment and also that there was no available surplus during the year in question and hence the workmen were entitled to minimum bonus under the Act. Modifying the agreement reached before the Conciliation Officer the Tribunal directed the management to pay an amount equivalent to 3 months' basic wages as on 31.3.1972 instead of 31.3.1970 as agreed to by the parties. It was held that the Tribunal having found that the workmen are not entitled to customary bonus and that the company during the year in question was at loss and there was no available surplus, the Tribunal could not legally proceed to make an award directing payment of bonus at a rate higher than the minimum bonus under Section 10 of the Act. The Act contemplates payment of only minimum bonus where employer has no allocable surplus in the concerned accounting year. It was further held that the rights of workmen for payment of bonus for the year in question will be governed by the terms of the agreement entered into before the Conciliation Officer. The Tribunal has no power to order payment of bonus by creating new contract between the parties in contravention of the provisions of the Act.

11. Payment of maximum bonus.—(1) Where in respect of any accounting year referred to in section 10, the allocable surplus exceeds the amount of minimum bonus payable to the employees under that section, the employer shall, in lieu of such minimum bonus, be bound to pay to every employee in respect of that accounting year bonus which shall be an amount in proportion to the salary or wage earned by the employe during the accounting year subject to a maximum of twenty per cent of such salary or wage.

(2) In computing the allocable surplus under this section, the amount set on or the amount set off under the provisions of section 15 shall be taken into account in accordance with the provisions of that section.

12. Calculation of bonus with respect to certain employees.—Where the salary or wage of an employee exceeds two thousand and five hundred rupees per mensem, the bonus payable to such employee under Section 10 or, as the case may be, under section 11 shall be calculated as if his salary or wage were two thousand and five hundred rupees per mensem.

It was held in *Indian Cable Co.* v. *Workmen*,[2] that although officers drawing salary between Rs. 750 and Rs. 1600 per month are employees under Section 2(13) and eligible for bonus, still for the purposes of calculating bonus payable under Sections 10 and 11, such officer's salary will be taken at the maximum of Rs. 750 per month and

1. (1987) 1 Lab LJ 53 (SC).
2. *Indian Cable Co.* v. *Workmen*, AIR 1972 SC 2195.

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will be eligible for bonus calculated on that basis. When he is paid over and above his bonus an *ex-gratia* amount to make up for the loss occasioned expenditure debited directly to Reserve. Such amount can, therefore, be added back to the gross profits of the employer for purposes of working out the available surplus.

Since the wage ceiling of an employee entitling him to bonus has been raised to three thousand and five hundred rupees and the wage ceiling for calculating of bonus under Section 12 has now been raised from 1600 to two thousand and five hundred rupees, the effect of the above decision of the Supreme Court is that officers drawing salary upto rupees 3,500/- per month are employees under Section 2(13) and are eligible for bonus but the amount of bonus payable to those drawing salary between rupees 2500/- and rupees 3500/- will be calculated as if his salary or wages were 2500 rupees per month.

13. Proportionate reduction in bonus in certain cases.—Where an employee has not worked for all the working days in an accounting year, the minimum bonus of one hundred rupees or, as the case may be, of sixty rupees, if such bonus is higher than 8.33 per cent of his salary or wage for the days he has worked in that accounting year, shall be proportionately reduced.

14. Computation of number of working days.—For the purposes of Section 13, an employee shall be deemed to have worked in an establishment in any accounting year also on the days on which—

(a) he has been laid off under an agreement or as permitted by standing orders under the Industrial Employment (Standing Orders) Act, 1946, or under the Industrial Disputes Act, 1947 or under any other law applicable to the establishment ;

(b) he has been on leave with salary or wage ;

(c) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment ; and

(d) the employee has been on maternity leave with salary or wage, during the accounting year.

15. Set on and set off of allocable surplus.—(1) Where for any accounting year the allocable surplus exceeds the amount of maximum bonus payable to the employees in the establishment under Section 11, then, the excess shall, subject to a limit of twenty per cent of the total salary or wage of the employees employed in the establishment in that accounting year, be carried forward for being set on in the succeeding accounting year and so on, upto and inclusive of the fourth accounting year to be utilised for the purpose of payment of bonus, in the manner illustrated in the Fourth Schedule.

(2) Where for any accounting year, there is no allocable surplus or the allocable surplus in respect of that year falls short of the amount of minimum bonus payable to the employees in the establishment under Section 10, and there is no amount or sufficient amount carried forward and set on under sub-section (1) which could be utilised for the purpose of payment of minimum bonus, then, such minimum amount or the deficiency, as the case may be, shall be carried forward for being set off in the succeeding accounting year and so on upto and inclusive of the fourth accounting year in the manner illustrated in the Fourth Schedule.

(3) The principle of set on and set off as illustrated in the Fourth Schedule shall apply to all other cases not covered by sub-section (1) or sub-section (2) for the purpose of payment of bonus under this Act.

(4) Where in any accounting year any amount has been carried forward and set on or set off under this section, then, in calculating bonus for the succeeding accounting

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year, the amount of set on or set off carried forward from the earlist accounting year shall first be taken into account.

In *Workmen N.G. Bank* v. *N.G. Bank*,[1] it was held that it is clear from the scheme of the Act and the context in which Section 15(1) occurs, following closely upon Sections 4 to 10 that basic condition for the applicability of Section 15(1) is that bonus is computed in accordance with the statutory formula provided in the preceding sections of the Act and as a result of such computation it is found that the allocable surplus is more than sufficient to cover the maximum bonus payable under the Act and where such is the case the sub-section provides that the excess over the amount of the maximum bonus, shall, to the extent of 20 per cent of the total wage or salary be carried forward and set on the succeeding year. This sub-section can have no application where no computation is made under the Act and bonus is paid not in accordance with the statutory formula, but, on an *ad hoc* basis. Then it is not possible to say what was really the bonus payable under the Act. It may be less or more than the bonus in fact paid.

It was held in *Co-operative Banks and Societies Employees' Federation Maharashtra* v. *A.K. Thorat Member I.T.*,[2] that since the Payment of Bonus Act is applicable to the society and bonus was in fact paid to the employees, then whatever amount was paid towards bonus must be referable to the Act and therefore the employer was entitled to claim set off on the amount of bonus paid to the employees during the relevant years.[3]

In *Express Cables Private Limited* v. *Commissioner of Income-tax*,[4] the question involved related to the extent of the liability of the Assessee under the Payment of Bonus Act which related to the years 1968-69 and 1969-70. It was held that the liability has to be determined with reference to Sections 10 and 11 of the Act. The Act requires a minimum and a maximum of bonus for an accounting year. Section 15 does not require the payment of any bonus in this or even in any subsequent assessment year until and unless there is a shortfall. The liability under the Act is only 20% in one accounting year. The provision requiring the assessee to carry forward the excess to the extent of another 20%, of the allocable surplus is only in the nature of a guarantee for the payment of minimum bonus in the subsequent accounting year in case there is any shortfall. Section 15 merely makes provision for meeting a contingency where there is inadequate allocable surplus in subsequent accounting year. Such a provision cannot be regarded as a liability of the accounting year in which the provision is required to be made.

It was further held in the above case that the assessee is entitled to deduct only the bonus required to be paid in the accounting year which is to the extent of a maximum of 20% of the allocable surplus in computing the total income of the accounting year. Any provision made to meet the liability of the assessee in the subsequent accounting year cannot be considered to be an expenditure laid out for the purpose of business in computing the profits of this accounting year and cannot therefore be allowed to be deducted.

16. Special provisions with respect to certain establishments.—(1) Where an establishment is newly set up, whether before or after the commencement of this Act, the employees of such establishment shall be entitled to be paid bonus under this Act in accordance with the provisions of sub-sections (1-A), (1-B) and (1-C).

(1-A). In the first five accounting years following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as

1. AIR 1976 SC 611.
2. (1988) 2 Lab LJ 484 (Bom).
3. *Ibid*.
4. (1992) 1 Lab LJ 441 (Cal).

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the case may be, from such establishment, bonus shall be payable only in respect of the accounting year in which the employer derives profits from such establishment and such bonus shall be calculated in accordance with the provisions of this Act in relation to that year but without applying the provisions of Section 15.

(1-B). For the sixth and seventh accounting years following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be, from such establishment, the provisions of Section 15 shall apply subject to the following modifications, namely—

(i) for the sixth accounting year— set on or set off, as the case may be, shall be made in the manner illustrated in the Fourth Schedule taking into account the excess of deficiency, if any, as the case may be, of the allocable surplus set on or set off in respect of the fifth and sixth accounting years ;

(ii) for the seventh accounting years— set on or set off, as the case may be, shall be made in the manner illustrated in the Fourth Schedule taking into account the excess of deficiency, if any, as the case may be, of the allocable surplus set on or set off in respect of the fifth, sixth and seventh accounting years.

(1-C). From the eighth accounting year following the accounting year in which the employer sells the goods produced or manufactured by him or renders services, as the case may be, from such establishment, the provisions of Section 15 shall apply in relation to such establishment as they apply in relation to any other establishment.

Explanation I.—For the purpose of sub-section (1), an establishment shall not be deemed to be newly set up merely by reason of a change in its location, management, name or ownership.

Explanation II.—For the purpose of sub-section (1-A), an employer shall not be deemed to have derived profit in any accounting year unless—

(a) he has made provision for that year's depreciation to which he is entitled under the Income-tax Act or, as the case may be, under the agricultural Income-tax law ; and

(b) the arrears of such depreciation and loss incurred by him in respect of the establishment for the previous accounting years have been fully set off against profits.

Explanation III.—For the purposes of sub-sections (1-A), (1-B) and (1-C) sale of the goods produced or manufactured during the course of the trial running of any factory or of the prospecting stage of any mine or any oil-field shall not be taken into consideration and where any question arises with regard to such production or manufacture, the decision of the appropriate Government, made after giving the parties a reasonable opportunity, of representing the case, shall be final and shall not be called in question by any court or other authority.

(2) The provisions of sub-sections (1), (1-A), (1-B) and (1-C) shall so far as may be, apply to new departments or undertakings or branches set up by existing establishments :

Provided that if an employer in relation to an existing establishment consisting of

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different departments, undertakings or branches (whether or not in the same industry) set up at different periods has, before the 29th May, 1965, been paying bonus to the employees of all such departments or undertakings or branches irrespective of the date on which such departments or undertakings or branches were set up, on the basis of the consolidated profits computed in respect of all such departments or undertakings or branches, then, such employer shall be liable to pay bonus in accordance with the provisions of this Act to the employees of all such departments or undertakings or branches (whether set up before or after that date) on the basis of the consolidated profits computed as aforesaid.

Section 16 is an exception to Section 10. An establishment exempted under Section 16(1) from liability to pay bonus under the Act is not liable to pay even the minimum bonus under Section 10 to its employee.[1]

In *C.I.W.T. Corpn.* v. *Their Workmen*,[2] the River Steam Navigation Co. Ltd. was a limited liability company incorporated in England in 1914. It owned a fleet of vessels which it plied in inland waters for carrying passengers and cargo from Calcutta to different places in Assam and *vice versa*. It also owned a dock. A majority of shares of the company were purchased by the Government of India and considerable financial assistance was also given by the Government of India but company incurred losses. After the armed conflicts between India and Pakistan in 1965 there was total cessation of business activity of the company and in consequence its financial position became so precarious that on 21st June, 1966 an application for winding up of the company was made by one of its creditors in the High Court of Calcutta, the Government of India put forward a scheme of arrangement and compromise and made an application to the High Court for sanction of such Scheme. In anticipation of sanction the Government of India incorporated, on 22nd February, 1967, the Central India Water Transport Corporation wholly owned by it and the properties and assets of the company were transferred to it. The Rajabagan Dockyard was also transferred. The question was whether it was a new establishment. It was held that it was the same establishment, the same manufacturing apparatus which was operated by the company prior to its taking over by the corporation. It is true that the corporation purchased and installed new plant and machinery in substitution as also in addition within the premises of the Rajabagan Dockyard but that does not mean that it became a newly set up establishment. The establishment went by the same name of Rajabagan Dockyard ; its address remained the same and some of the old plant and machinery also continued to be used by the Corporation. The Registration number of the establishment under the Factories Act also remained the same. Therefore, Section 16(1) was not attracted and corporation was not entitled to claim immunity from payment of bonus.

When the ownership of the establishment, which is nothing but another name for the apparatus, is transferred from one person to another, the establishment remains the same ; merely its ownership is changed and it cannot be said to be a new establishment in the hands of the transferee. The transferee may become the owner of the establishment, he would not necessarily be a successor-in-interest of the transferor in respect of the business carried on in the establishment. The question whether he can be held to be a successor in interest of the transferor would depend on consideration of several relevant facts. The two concepts are entirely different. One may acquire the ownership of an establishment without taking over the business as a going concern and becoming a successor-in-interest in respect of it. The latter is not a relevant consideration for determining the applicability of Section 16.[3]

1. *Workmen, H.M.T.* v. *Presiding Officer, National Tribunal, Calcutta*, AIR 1973 SC 2300.
2. AIR 1975 SC 1639.
3. *C.I.W.T. Corpn.* v. *Their Workmen*, AIR 1975 SC 1639.

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The liability of the new establishment to pay bonus to its workmen arises only when the employer derives profits after deducting depreciation as required by Section 32(1) of the Income Tax Act. Thus where the Balance Sheet and Profit and Loss Account of an employer shows profits consequent on the calculation of depreciation by straight line method but actually there were losses if the depreciation was deducted as required under Section 32 of the Income Tax Act, the employer was not liable to pay bonus to the employees.[1]

It is true that under clause (a) of sub-section (1) of Section 16, workmen employed in a new establishment are entitled to be paid bonus under that Act from the accounting year in which the employer derives profits from the establishment. But the word 'profit' must obviously be construed according to its ordinary sense—a sense in which it is used in trade and industry because the rationale behind clause (a) of sub-section (1) of Section 16 is that it is only when the employer starts making profit in the commercial sense he should become liable to pay bonus to the workmen under the Act.[2]

Explanation II embodies a clear legislative mandate that whatever be the methods of computation of depreciation followed by an employer it should be deducted in accordance with the provisions of Income Tax Act to determine the profits in an accounting year. The employer can be said to have earned profits only when profits remain after adjusting such depreciation.

17. Adjustment of customary or interim bonus against bonus payable under the Act.—Where in any accounting year—

(a) an employer has paid by puja bonus or other customary bonus to an employee ;

(b) an employer has paid a part of the bonus payable under this Act to an employee before the date on which such bonus becomes payable ;

then, the employer shall be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him to the employee under this Act in respect of that accounting year and the employee shall be entitled to receive only the balance.

The Bonus Act is a complete Code on the subject of profit-based bonus but is silent on other kinds of bonus such as one oriented on custom. Thus the Act as it stood in 1965 does not bar claims to customary bonus of those based on conditions of service.[3] Statutory bonus is profit bonus. Nevertheless there is provision for avoidance of unduly heavy burden under different heads of bonus. For this reason Section 17 provides that where an employer has paid any puja bonus or other customary bonus, he will be entitled to deduct the amount of bonus so paid from the amount of bonus payable by him under the Act. Of course if the customary bonus is thus recognised statutorily and, if in any instance it happens to be much higher than the bonus payable under the Act, there is no provision totally cutting off the customary bonus. The provision for deduction in Section 17, on the other hand, indicates the independent existence of customary bonus although, to some extent, its quantum is adjustable towards statutory Bonus.[4] The Bonus Act seeks to provide for the payment of bonus to persons employed 'in certain establishment' not in all establishments. Customary bonus does not require calculation of profits, available surplus because it is a payment founded on long usage and justified often by spending on festivals and the Act gives no guidance to fix the quantum of festival bonus ; nor does it expressly wish such a usage.[5]

1. *Central Coal Washery* v. *Workmen*, AIR 1978 SC 1424.
2. *Ibid.*
3. *Mumbai Kamgar Sabha* v. *Abdullbhai*, AIR 1976 SC 1455.
4. *Ibid.*
5. *Mumbai Kamgar Sabha* v. *Abdullbhai*, AIR 1976 SC 1455.

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In *Hukumchand Jute Mills* v. *2nd Industrial, Tribunal W.B.*[1] the union claimed customary bonus and it was contended that the payment of such a kind of bonus was negatived by virtue of the provisions of the Amending Act of 1976. It was held that :

> "The long title of the Act as substituted by the Amending Act purports to provide specifically for payment of bonus "on the basis of profits or on the basis of production or productivity and for matters connected therewith". The emphatic inference flows therefrom that customary or contractual bonus goes beyond the pale of Amending Act which modifies the previous one by bringing within its range bonus on the basis of production or productivity also. Section 17 has been left intact. That section in express terms refers to puja bonus and other customary bonus as available for deduction from the bonus payable under the Act, thus making a clear distinction between the bonus payable under the Act and "puja bonus or other customary bonus". So long as this section remains without amendment the inference is clear that the categories by the Act, as amended, did not deal with customary bonus".

It was held in *Himalaya Drug Co. Makali* v. *II Additional Labour Court, Bangalore*[2] that if an employee is paid puja or customary bonus before he is found guilty of the act of misconduct, it will not be open to the employer to recover that amount on the ground that he had a right of adjustment under Section 17 because the disqualification in Section 9 applies to bonus receivable under the Act and not to puja or customary bonus.

In *Workmen of Kettlewell Bullen & Co. Ltd.* v. *Kettlewell Bullen & Co. Ltd. and others*[3] in pursuance to a settlement between workmen and management bonus was paid at the rate of 3¼ months' basic pay for the years 1959 to 1963 and for the year 1964 bonus was paid at the rate of 4%. For the years 1965 to 1973 bonus was paid at the rate of 10.5% of the salary or wages and it was generally paid before the commencement of Pooja festival. It was held that in view of the above it can be said that the payment had been made by the management by way of bonus over an unbroken series of years and the said payment did not depend upon the earning or profits. It was further held that the Payment of Bonus Act, 1965 is confined to its application to profit bonus and other kinds of bonus are not covered by the Act. Even the High Court has found that the payment had no link with the profit. Hence the reference to Section 34(3) of the Payment of Bonus Act in the settlement would not alter the nature of the payment so as to convert it into a bonus under the said Act. The reference to Section 34(3) must be regarded as having been made by way of abundant caution to exclude the liability of the management but that would not alter the nature of payment. It was further held that if the bonus that was being paid by the management is found to be customary bonus then the management would be entitled to deduct the amount so paid from the amount for bonus under the Payment of Bonus Act in respect of that accounting year.

In *Baidyanath Ayurveda Bhawan Mazdoor Union, Patna* v. *The Management of Shri Baidyanath Ayurveda Bhawan Ltd.*,[4] attendance bonus was being paid to the workers prior to the passing of Payment of Bonus Act, 1965. After coming into force of the Bonus Act an industrial dispute concerning the entitlement of workmen to the payment of bonus for the year 1966-67 under the Act over and above "attendance bonus" was referred for adjudication to the Industrial Tribunal of Bihar. The Tribunal upheld the claim for payment of bonus under the Act as well as the attendance bonus. But Patna High Court had held that no attendance bonus was payable when bonus was

1. AIR 1979 SC 876.
2. (1986) 2 Lab LJ 45 (Karnataka).
3. (1995) 1 LLJ 1201 (SC).
4. (1984) 1 LLJ 116 (SC).

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paid under the Act. The Supreme Court found the claim of the employee justified for both attendance bonus and bonus under the Act. The Supreme Court held that on the finding by the Tribunal as also the High Court that attendance bonus was paid and it being outside the purview of the Act, the High Court was not right in vacating the award.

In the *Chief General Manager State Bank of India* v. *The Presiding Officer, Central Government Industrial Tribunal and another*[1] the State Bank of India was making payment of bonus of one month basic pay as drawn on 30th June and 31st December from 1944 till first half of 1975. The bank discontinued the bi-annual payment from second half of 1975. This led to an industrial dispute which was referred for adjudication and the Tribunal passed an award upholding the claim of the workmen for customary bonus at the rate of 2 months' basic pay. It was held that in order to support a claim of customary bonus the payment should have been over an unbroken series of years, it should have been for sufficiently long period, payment must have been at an uniform rate and must also have been made not out of bounty. Judged in the light of above test workers are held entitled to get customary bonus. No evidence was shown by the bank that payments were made out of bounty. Further, payments made over and above two months' basic pay for some years annually as a result of negotiation and settlement does not abrogate the right to get customary bonus and does not break the uniformity of rate of payment. So also the use of the expression '*ad hoc*', 'additional *ad hoc*', 'provisional' and 'on account' in the documents evidencing disbursement of bonus will not militate against the concept of customary bonus. Furthermore the mere user of the expression in the documents that the bi-annual disbursements shall not be counted as precedent has no meaning in view of the fact that bonus at an uniform rate was paid throughout without any break.

18. Deduction of certain amounts from bonus payable under the Act.—When in any accounting year, an employee is found guilty of misconduct causing financial loss to the employer, then, it shall be lawful for the employer to deduct the amount of loss from the amount of bonus payable by him to the employee under this Act in respect of that accounting year only and the employee shall be entitled to receive the balance, if any.

19. Time-limit for payment of bonus.—All amounts payable to an employee by way of bonus under this Act shall be paid in cash by his employer—

(a) where there is dispute regarding payment of bonus pending before, any authority under Section 22, within a month from the date on which the award becomes enforceable or the settlement comes into operation, in respect of such dispute ;

(b) in any other case, within a period of eight months from the close of the accounting year :

Provided that the appropriate Government of such authority as the appropriate Government may specify in this behalf may, upon an application made to it by the employer and for sufficient reasons, by order, extend the said period of eight months to such further period or periods as it thinks fit ; so, however, that the total period so extended shall not in any case exceed two years.

The claim for bonus can be made only after the close of the accounting year and in accordance with the provisions of the Act. The gross profits can be calculated only at the end of the accounting year and the available and allocable surplus can also be worked out only at the end of the accounting year. There is no question of an employer

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1. (1987) 1 Lab LJ 66 (Mad).

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computing the gross profits available and allocable surplus in the middle of an accounting year or at any time before the close of the relevant accounting year.[1]

The direction given by the Tribunal making it obligatory on the management of a textile mill to make half-yearly payment of bonus, apart form being opposed to the scheme of the Act, also runs counter to the provisions of Section 19. Whether it is the minimum bonus of 4 per cent under Section 10 or the maximum bonus of 20 per cent under Section 11, they are to be paid only within the period mentioned in Section 19. An employer may voluntarily pay amount during the accounting year by way of part bonus which he is entitled to take into account and adjust when making final payment at the close of the accounting year. It is one thing to say that the employer can make voluntary payment, but it is a different thing for the Tribunal to give a direction to that effect.[2] Therefore, the mere fact that the management has been making payments on previous occasions every half-yearly, does not confer a right on the employee thereof to have such payments by way of bonus in the same manner even after the Act came into force.[3]

It was held in *M/s. E.I.D. Parry (India) Ltd., Madras* v. *Industrial Tribunal, Madras & others*,[4] that the Industrial Tribunal is justified in granting interest on the bonus awarded to the worker from the due date. The company, by failing to pay the bonus from the due date and also utilising the amount so saved for business, has enriched itself. The company had the benefit of money for about eleven years and as such it is bound to pay interests.

20. Application of Act to establishments in public sector in certain cases.—(1) If in any accounting year an establishment in public sector sells any goods produced or manufactured by it or renders any services, in competition with an establishment in private sector, and the income from such sale or services or both is not less than twenty per cent of the gross income of the establishment in public sector for that year, then the provisions of this Act shall apply in relation to such establishment in public sector as they apply in relation to a like establishment in private sector.

(2) Save as othervise provided in sub-section (1), nothing in this Act shall apply to the employees employed by any establishment in public sector.

In *Orissa Transport Co.* v. *The Workmen*,[5] at the hearing of appeals, the parties have entered into a settlement regarding the payment of bonus for the years 1963-64 and 1964-65. The Company and the workmen also agreed regarding certain deduction to be made from the amount of bonus. It was also agreed that the question as to whether Section 20 of this Act would be applicable to the abovementioned company shall remain open and may be agitated in the references which were pending before the Tribunal for the years subsequent to 1964-65. It was held that the settlement in respect of payment of bonus for the year 1964-65 will not involve by implication a decision on the point that the abovementioned company is governed by Section 20 of the Payment of Bonus Act.

21. Recovery of bonus due from an employer.—Where any money is due to an employee by way of bonus from his employer under a settlement or an award or agreement, the employee himself or any other person authorised by him in writing in this behalf, or in the case of the death of the employee, his assignee or heirs may, without prejudice to any other mode of recovery make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate

1. *Binny Ltd.* v. *Workmen*, AIR 1973 SC 353.
2. *Ibid.*
3. *Ibid.*
4. (1971) 1 LLJ 259 (Mad).
5. AIR 1976 SC 2224.

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Government or such authority as the appropriate Government may specify in this behalf, is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue :

Provided that every such application shall be made within one year from the date on which the money became due to the employee from the employer :

Provided further that any such application may be entertained after the expiry of the said period of one year, if the appropriate Government is satisfied that the applicant had sufficient cause for not making the application within the said period.

Explanation.—In this section and in Sections 22, 23, 24 and 25, "employee" includes a person who is entitled to the payment of bonus under this Act but who is no longer in employment.

The mode of recovery prescribed under this section shall be available only if the bonus sought to be recovered is "under a settlement or an award or an agreement". It will not apply to recovery of bonus which is payable under the Act.[1]

22. Reference of disputes under the Act.—Where any dispute arises between an employer and his employees with respect to the bonus payable under this Act or with respect to the application of this Act to an establishment in public sector, then, such dispute shall be deemed to be an industrial dispute within the meaning of the Industrial Disputes Act, 1947 or of any corresponding law relating to investigation and settlement of industrial disputes in force in a State and the provisions of that Act or, as the case may be, such law, shall save as otherwise expressly provided, apply accordingly.

In case of a reference of dispute under Section 22 of this Act, the Authority under the Wages Act will have no jurisdiction to proceed under the Wages Act. But where there is no dispute, the Authority can proceed under Section 15 of the Payment of Wages Act.[2] It is not every dispute between employer and employee which would be covered by Section 22, that section would be attracted only if the two tests laid down in *Sanghvi Jivraj Ghewar Chand and others* v. *Secretary Madras Chillies, Grain and Kirana Merchants Workers Union*,[3] are fulfilled.[4] The two types of disputes covered by Section 22 are[5] :

(1) with respect of the bonus payable under the Act, or

(2) with respect to application of the Bonus Act.

A dispute raised by an individual workman with regard to payment of bonus is not an industrial dispute within the meaning of Section 22 of the Payment of Bonus Act because the word 'employees' has been used in the section and not 'employee'. In the absence of a provision in the Bonus Act similar to Section 2-A of the Industrial Disputes Act, an individual dispute cannot be deemed to be an industrial dispute. Therefore, when a claim for the payment of minimum bonus is made by an employee of an establishment to which the Act applies, such a claim does not fall within Section 22 of the Payment of Bonus Act so as to be deemed to be an industrial dispute requiring reference under Section 10 of the Industrial Disputes Act. Such a claim can be investigated and the relief awarded by the Labour Court upon a petition filed by the employee under Section 33-C(2) of the Industrial Disputes Act.[6]

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1. *Labour Inspector* v. *Authority, P.W. Act*, (1976) 1 LLJ 511 (MP).
2. *Ibid.*
3. (1969) 1 LLJ 719 (SC).
4. *Labour Inspector* v. *Authority, P.W. Act*, (1976) 1 LLJ 511 (MP).
5. *Sanghvi Jivraj Ghewar Chand and others* v. *Secretary, Madras Chillies Grain and Kirana Merchants Workers Union*, (1969) 1 LLJ 719 (SC).
6. *Anand Oil Industries* v. *Labour Court, Hyderabad*, AIR 1973 AP 182.

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In *Alind Supervisory Staff Association* v. *Aluminimum Industries Ltd.*,[1] the question was whether under an agreement, made under Section 18 of the Industrial Disputes Act, which provided for payment of bonus to the workmen of respondents company, supervisory personnel of the company, who are not covered by the definition of workmen as provided by Industrial Disputes Act can claim bonus by virtue of their being "employee" in terms of the Bonus Act. Disallowing the claim of the supervisory staff for bonus the Kerala High Court has made the following observations :

(i) Section 22 of the Bonus Act is a deeming provision as it says that any dispute relating to bonus payable under the Act is deemed to be an industrial dispute.

(ii) The Bonus Act does not provide for any machinery to resolve disputes relating to bonus. Such disputes can be resolved by recourse to the machinery provided under I.D. Act and this recourse is available even to those persons claiming bonus who are not workmen within the meaning of I.D. Act but are employees within the meaning of Bonus Act.

(iii) In the instant case the workmen with whom there is an agreement on bonus have no complaint and no dispute has been raised by them. The complaint is only that of the "employees" who are not workmen and their claim for bonus has to be settled strictly in terms of the Bonus Act and with the aid of the machinery incorporated for such purpose by means of the deeming provisions of Section 22 of the Bonus Act.

(iv) There is no agreement with the employees. If that is so the only substantive right available to them under the Bonus Act is for profit bonus. Whatever be the substantive right available to workmen under the I.D. Act, those rights cannot be enforced by employees other than workmen.

(v) All that Section 22 of the Bonus Act seeks to achieve is the enforcement of the substantive right under that Act by means of the machinery under the Industrial Disputes Act.

Therefore in the present case since the agreement under Section 18 of the Industrial Disputes Act was made only with workmen and not with the 'employees' who were not covered by the definition of workmen and also that the non-workmen employees had no substantive right under the Bonus Act either, therefore, the benefit of Section 22 of the Bonus Act cannot be claimed by the supervisory staff.

In *Pappu and another* v. *Raja Tile and Match Works*,[2] the question was whether wages paid for national and Festival holidays could be included in computing bonus. The appellants moved the Labour Court under Section 33-C (2) of the Industrial Disputes Act. The employer contended that the said dispute could not be decided under Section 33-C(2) of the Industrial Disputes Act. It was held that the Bonus Act did not create any independent machinery for the settlement of bonus disputes, but relied on the provisions of the Industrial Disputes Act for its enforcement. The Payment of Bonus Act has not excluded the application of Industrial Disputes Act and therefore it cannot be assumed that only some of the provisions of Industrial Disputes Act applied to the claim for bonus.

In the present case the dispute is not about the liability to pay bonus but only about the quantum of bonus. The right to bonus is in respect of a particular accounting year. The year is the unit for payment. The dispute regarding quantum of bonus can be rightly decided under Section 33-C (2) of the Industrial Disputes Act.

In *M/s. K.K. Mohd. Hanif* v. *Jhansi Bidi Mazdoor Union*,[3] certain persons were

1. (1981) 1 LLJ 418 (Kerala).
2. (1989) 1 Lab LJ 14 (Kerala).
3. (1980) 2 LLJ 289 (All).

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engaged by the petitioner concerned for packing of bidis and they had the option to work in the factory or not but they worked under the control and supervision of the petitioner. The question is whether those persons were employees within the meaning of the Bonus Act. It was held that the packers who were claiming payment of bonus did not constitute casual, heterogeneous, miscellaneous and irregular group but were regularly working as packers in the premises of the petitioner. It is true that on any particular day they may choose to attend to the work at the premises of the factory or not but nonetheless they were employees of the petitioner within the meaning of the Bonus Act since on those days on which they did work, they worked under the control and supervision of the petitioner and the mere fact that the payment was on daily wages did not affect their status as employees. In this case a dispute had arisen between the petitioner and his employees with regard to the payment of bonus. Section 22 of the Payment of Bonus Act clearly applies to a dispute of this kind.[1]

In was held in *Ashok Leyland Ltd., Madras* v. *Second Addl. Labour Court, Madras & another*,[2] that the question whether the employees can claim difference in bonus by virtue of payment of Bonus (Second Amendment) Ordinance, 1985 by which the ceiling in wages were revised and coverage of employees was enlarged in an industrial dispute with reference to the bonus payable under the Act as envisaged by Section 22 of the Payment of Bonus Act. Any claim made by the employees with regard to payment of difference in bonus could be decided only by Tribunal on reference and no such claim petitions can be made under Section 33-C(2) of the Industrial Disputes Act.

23. Presumption about accuracy of balance-sheet and profit and loss account of corporations and companies.—(1) Where, during the course of proceedings before an arbitrator or Tribunal under the Industrial Disputes Act, 1947, or under any corresponding law relating to investigation and settlement of industrial disputes in force in a State (hereinafter in this section and in Sections 24 and 25) referred to as the "said authority" to which any dispute of the nature specified in Section 22 has been referred, the balance sheet and the profit and loss account of an employer, being a corporation or a company (other than a banking company), duly audited by the Comptroller and Auditor-General of India or by auditors duly qualified to act as auditors of companies under sub-section (1) of Section 226 of the Companies Act, 1956 are produced before it, then the said authority may presume the statements and particulars contained in such balance sheet and profit and loss account to be accurate and it shall not be necessary for the corporation or the company to prove the accuracy of such statements and particulars by the filing of an affidavit or by any other mode :

Provided that where the said authority is satisfied that the statements and particulars contained in the balance sheet or the profit and loss account of the corporation or the company are not accurate, it may take such steps as it thinks necessary to find out the accuracy of such statements and particulars.

(2) Where an application is made to the said authority by any trade union being a party to the dispute or where there is no trade union, by the employees being a party to the dispute, requiring any clarification relating to any item in the balance sheet or the profit and loss account, it may, after satisfying itself that such classification is necessary, by order, direct the corporation or, as the case may be, the company, to furnish to the trade union or the employees such clarification within such time as may be specified in the direction and corporation or, as the case may be, the company, shall comply with such direction.

Under Section 23 there is a presumption about the accuracy of balance sheets and profit and loss accounts of Corporations and Companies and when the accuracy of the

1. *Ibid*
2. (1992) 2 Lab LJ 128 (Madras).

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particulars contained in these documents have not been challenged in the case, reliance will have to be placed thereon.[1]

24. Audited accounts of banking companies not to be questioned.—(1) Where any dispute of the nature specified in Section 22 between an employer, being a banking company, and its employees has been referred to the said authority under this section and during the course of proceedings the accounts of the banking company duly audited are produced before it, the said authority shall not permit any trade union or employees to question the correctness of such accounts, but the trade union or the employees may be permitted to obtain from the banking company such information as is necessary for verifying the amount of bonus due under this Act.

(2) Nothing contained in sub-section (1) shall enable the trade union or the employees to obtain any information which the banking company is not compelled to furnish under the provisions of the Section 34-A of the Banking Regulation Act, 1949.

25. Audit of accounts of employers, not being corporations or companies.—(1) Where any dispute of the nature specified in Section 22 between an employer not being a corporation or a company, and his employees has been referred to the said authority under that section and the accounts of such employer audited by any auditor duly qualified to act as auditor of companies under sub-section (1) of Section 226 of the Companies Act, 1956 are produced before the said authority, the provisions of Section 23, shall, so far as may be, apply to the accounts so audited.

(2) When the said authority finds that the accounts of such employer have not been audited by any such auditor and it is of opinion that an audit of the accounts of such employer is necessary for deciding the question referred to it, then, it may, by order direct the employer to get his accounts audited within such time as may be specified in the direction or within such further time as it may allow by such auditor or auditors as it thinks fit and thereupon the employer shall comply with such direction.

(3) Where an employer fails to get the accounts audited under sub-section (2) the said authority may, without prejudice to the provisions of Section 28, get the accounts audited by such auditor or auditors as it thinks fit.

(4) When the accounts are audited under sub-section (2) or sub-section (3) the provisions of Section 23 shall, so far as may be, apply to the accounts so audited.

(5) The expenses of, and incidental to, any audit under sub-section (3) including the remuneration of the auditor or auditors shall be determined by the said authority which determination shall be final and paid by the employer and in default of such payment, shall be recoverable from the employer in the manner provided in Section 21.

26. Maintenance of registers, records, etc.—Every employer shall prepare and maintain such registers, records and other documents in such form and in such manner as may be prescribed.

27. Inspectors.—(1) The appropriate Government may, by notification in the *Official Gazette*, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act and may define the limits within which they shall exercise jurisdiction.

(2) An Inspector appointed under sub-section (1) may, for the purpose of ascertaining whether any of the provisions of this Act has been complied with—

(a) require an employer to furnish such information as he may consider necessary ;

(b) at any reasonable time and with such assistance, if any, as he thinks fit, enter any establishment or any premises connected therewith and require any one found in charge thereof to produce before him for examination any accounts, books, registers and other documents relating to the employment of persons

1. *I.L.C. Manufacturers v. Workmen*, AIR 1972 SC 343.

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or the payment of salary or wage or bonus in the establishment ;

(c) examine with respect to any matter relevant to any of the purposes aforesaid, the employer, his agent or servant or any other person found in charge of the establishment or any premises connected therewith or any person whom the Inspector has reasonable cause to believe to be or to have been an employee in the establishment ;

(d) make copies of, or take extract from any book, register or other document maintained in relation to the establishment ; and

(e) exercise such other powers as may be prescribed.

(3) Every Inspector shall be deemed to be public servant within the meaning of the Indian Penal Code, 1860.

(4) Any person required to produce any accounts, books, register or other document or to give information by an Inspector under sub-section (1) shall be legally bound to do so.

(5) Nothing contained in this section shall enable an Inspector to require a banking company to furnish or disclose any statement or information or to produce or give inspection of, any of its books of account or other documents which a banking company cannot be compelled to furnish, disclose, produce or give inspection of, under the provisions of Section 34-A of the Banking Regulation Act, 1949.

28. Penalty.—If any person—

(a) contravenes any of the provisions of this Act or any rule made thereunder ; or

(b) to whom a direction is given or requisition is made under this Act fails to comply with the direction or requisition ;

he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

29. Offences by companies.—(1) If the person committing an offence under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence, has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) "company" means any body corporate and includes a firm or other association of individuals ; and

(b) "director" in relation to a firm, means a partner in the firm.

In *V.B. Sivalingam Chettiar, Managing Director Abirami Cotton Mills Ltd., Sullurpet* v. *State represented by the Labour Officer, Nellore*,[1] prosecution was launched against the Managing Director of the Company alone under Sections 28 and 29 of the

1. (1986) 2 Lab LJ 164 (AP).

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Payment of Bonus Act for failure to maintain registers and produce the same on demand by the Inspector. In a petition to quash the proceedings launched against the Managing Director it was held that under Section 2(14) of the Payment of Bonus Act, it is the company that is the owner and under Section 26, the liability is cast upon the employer to maintain the registers. The complaint is made against an individual. But that is not to say that the company is accused under Section 29 where the offence is committed by an employer who happens to be a company, in addition to the company every person who at the time of commission of the offence was in charge of and was responsible to the company for the conduct of the business should be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Without there being prosecution against the company itself who is employer, no prosecution against one of the Directors is permissible. It is only when the principal offender *i.e.*, the company is found guilty, then the person who is in charge of and was responsible to the company for the conduct of business can also be proceeded against. Section 29 does not authorise the prosecution being launched only against the Director of the Company. It was further held that failure to make requisite allegations in the complaint will vitiate the complaint and such complaint is not maintainable. It is, therefore, incumbent on the complainant to allege that the person against whom the complaint was lodged was in charge of and was responsible to the company for the conduct of the business.

In *B.K. Madhavan, Bank of Thanjavur Ltd.* v. *State Rep. by the Labour Enforcement Officer (Central)*,[1] a complaint regarding non-payment of bonus to a part-time sweeper, an employee of the bank was filed by the Enforcement Officer but the bank was not made a party. Therefore, a petition was filed for quashing the complaint. The plea of the bank was that the said sweeper was not an employee and as such not entitled to bonus and therefore this dispute had to be decided first. It was held that the above plea cannot be accepted because its acceptance would mean that in every case the accused in the prosecution under Payment of Bonus Act would raise an industrial dispute which will have to be referred for adjudication. This would stultify all the penal provisions under the Payment of Bonus Act. It will be for the trial court to determine whether a part-time sweeper is an employee within the meaning of Payment of Bonus Act. Further the prosecution is launched by the enforcing authorities for alleged violation of the provisions of the Act and the same will not be an industrial dispute because the parties to the prosecution are not the employer and employee. The complaint was filed against the Chairman and Chief Executive Officer of the bank and the bank though not initially made a party can be made a party. This is technical defect which can be cured. The proceedings cannot be quashed on such a technical flaw which is curable.

30. Cognizance of offences.—(1) No court shall take cognizance of any offence punishable under this Act, save on complaint made by or under the authority of the appropriate Government or an officer of that Government (not below the rank of a Regional Labour Commissioner in the case of an officer of the Central Government, and not below the rank of a Labour Commissioner in the case of an officer of the State Government) specially authorised in this behalf by that Government.

(2) No court inferior to that of a Presidency Magistrate or a magistrate of the first class shall try any offence punishable under this Act.

31. Protection of action taken under the Act.—No suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government for anything which is in good faith done or intended to be done in pursuance of this Act

1. (1989) 1 Lab LJ 149 (Madras).

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or any rule made thereunder.

31-A. Special provision with respect to payment of bonus linked with production or productivity.—Notwithstanding anything contained in this Act—

(i) where an agreement or a settlement has been entered into by the employees with their employer before the commencement of the Payment of Bonus (Amendment) Act, 1976, or

(ii) where the employees enter into any agreement or settlement with their employer after such commencement

for payment of an annual bonus linked with production or productivity in lieu of bonus based on profits payable under this Act, then such employees shall be entitled to receive bonus due to them under such agreement or settlement, as the case may be :

Provided that any such agreement or settlement whereby the employees relinquish their right to receive the minimum bonus under Section 10 shall be null and void in so for as it purports to deprive them of such right :

Provided further that such employees shall not be entitled to be paid such bonus in excess of twenty per cent of the salary or wage earned by them during the relevant accounting year.

In *Madurai Coats Ltd.* v. *Their Workmen*,[1] the Supreme Court held that by dividing Section 31-A into two separate clauses, the legislature has made its intention clear that all agreements or settlements entered into before or after 25.9.1975, would attract the section if they fall within its terms.

It is true that in regard to productivity bonus Section 31-A shall have operation but it speaks nothing about the other kinds of bonus. Similarly, the submission that all agreements inconsistent with the Act shall become inoperative has no substance vis-a-vis customary bonus. The Bonus Act, 1965 does not deal with customary bonus and is confined to profit based or productivity-based bonus. The provisions of the Act have no say on customary bonus and cannot, therefore, be inconsistent therewith. Conceptually, statutory bonus and customary bonus operate in two fields and do not clash with each other.[2]

32. Act not to apply to certain classes of employees.—Nothing in this Act shall apply to—

(i) employees employed by the Life Insurance Corporation of India ;

(ii) seamen as defined in clause (42) of Section 3 of the Merchant Shipping Act, 1958 ;

(iii) employees registered or listed under any scheme made under the Dock Workers (Regulation of Employment) Act, 1948, and employed by registered or listed employers ;

(iv) employees employed by an establishment engaged in any industry carried on by or under the authority of any department of the Central Government or a State Government or a local authority ;

(v) employees employed by—

(a) the Indian Red Cross Society or any other institution of a like nature (including its branches) ;

(b) universities and other educational institutions ;

(c) institutions (including hospitals, chamber of commerce and social welfare institutions) established not for purposes of profit ;

(vi) employees employed through contractors on building operations :

1. AIR 1979 SC 449.
2. *Hukumchand Jute Mills* v. *2nd Industrial Tribunal, W.B.*, AIR 1979 SC 876.

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(vii) omitted ;

(viii) employees employed by the Reserve Bank of India ;

(ix) employees employed by—

(a) the Industrial Finance Corporation of India ;

(b) any Financial Corporation established under Section 3, or any Joint Financial Corporation established under Section 3-A of State Financial Corporation Act, 1951 ;

(c) the Deposit Insurance Corporation ;

(d) the National Bank for Agricultural and Rural Development ;

(e) the Unit Trust of India ;

(f) the Industrial Development Bank of India ;

(fa) the Small Industries Development Bank of India established under section 3 of the Small Industries Development Bank of India Act, 1989 ;

(ff) the National Housing Bank ;

(g) any other financial institution other than a banking company, being an establishment in public sector, which the Central Government may, by notification in the Official *Gazette*, specify, having regard to—

(i) its capital structure ;

(ii) its objectives and the nature of its activities ;

(iii) the nature and extent of financial assistance or any concession given to it by the Government ; and

(iv) any other relevant factor ;

(x) omitted ;

(xi) employees employed by inland water transport establishments operating on routes passing through any other country.

In *Union of India* v. *R.C. Jain*,[1] the question was whether the Delhi Development Authority was an authority fulfilling the definition of 'local authority' and as such fell outside the scope of Bonus Act by reason of the provisions of Section 32(iv). It was held that it is an authority to which is entrusted by statute a governmental function ordinarily entrusted to municipal bodies and that function is to make regulations. Thus Delhi Development Authority is endowed with all the usual attributes and characteristics of a local authority and as such it falls outside the scope of the Bonus Act.

It was held in *Housing Board of Haryana* v. *Haryana Housing Board Employees Union & others*,[2] that Haryana Housing Board Act, 1971 gives status of local authority to Housing Board only for limited purposes. It is not a local authority within the meaning of Article 12 of the Constitution because the rule of *ejusdem generis* cannot be applied to Article 12 as the definition of State in this Article includes several bodies which are heterogeneous in character and there is no genus in the definition. The Haryana Housing Board Act has given the status of local authority to the Board only fictionally because in reality it is not a local authority. Therefore the Haryana Housing Board is not a local authority within the meaning of Section 32(iv) of Payment of Bonus Act, 1965.

In *Workman of Central Institute of Plastics Engineering and Tools*, v. *Management and others*,[3] the Institute was making plastic moulds for the purpose of training. It was held that it is not a commercial institute established for purpose of profit. Education

1. (1981) 1 LLJ 402 (SC).
2. (1996) 1 LLJ 833 (SC).
3. (1990) 1 Lab LJ 593 (Madras).

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does not mean mere teaching. The Institute imports specialised institution and practical training in the field of plastic technology. The consultant service is rendered free. Therefore, when training is imparted to students, the institute is an educational institution entitled to exemption under Section 33(v)(b). It is not established for the purpose of profit within the meaning of Section 32(v)(c).

In *Maharashtra State Electricity Board* v. *M.C. Chitale*,[1] the question was whether the Maharashtra Electricity Board is exempt from the provisions of the Bonus Act. Exemption was claimed mainly under Section 32(iv) and 32(v)(c) of the Bonus Act. Under Section 32(iv), however large the powers of the State Government may be, the determining factor will be whether the Board has independent legal existence or not and whether the State Government is running the industry as its own department. Applying this test it is difficult to exempt the Electricity Board.

As far as Section 32(v)(c) is concerned only particular types of institutions, such as hospitals, social welfare institutions and chambers of commerce alone are intended to be covered and not every type of institution, including a statutory corporation. It is not possible to come to the conclusion that the Electricity Board is established not for profit and is exempt in terms of Section 32(v)(c).[2]

In *Swarajya Ashram Karmachari Sangh* v. *Swarajya Ashram Kanpur*,[3] the Supreme Court held that considering the aims and objects of the Ashram it would fall within the exemption of Section 32(v)(c) of the Act. The Ashram is a non-profit establishment and sales are only incidental to the object of the Ashram.

In *Tamil Nadu Housing Board, State of Tamil Nadu* v. *K. Sabanayagam*,[4] the Tamil Nadu Housing Board applied for exemption under Section 36 of the Payment of Bonus Act. Prior to the year of dispute the Housing Board was paying bonus to its employees. Section 32(v)(c) deals with automatic exemption, that is the Act does not apply to institutions established not for purposes of profit. Section 36 confers power on the appropriate Government to grant exemption from the application of Act keeping in view the financial position of the establishment etc. It was held that the Housing Board has applied for exemption under Section 36 of the Act. Seeking exemption presupposes the applicability of the Act. If the Act does not apply there could be no question of getting exemption under Section 36. The question whether Tamil Nadu Housing Board comes within the exemption clause under Section 32(v)(c) is one of fact. In this case the Board admitted, acquiesced and accepted that factual position. Hence there was no need to consider whether Board is a Social Welfare Institution not established for the purpose of profit under Section 32(v)(c).

Another point raised on behalf of the Housing Board was that it was entitled for automatic exemption under Section 32(v)(c) and this right was provided by the Statute and as such it cannot be deprived of that benefit. That is there cannot be estoppel against statute. It was held that the question of Board coming within the exception clause is one of fact. If there could be an admission of acquiescence in and acceptance of, the factual position by the very same institution, then there is no element of estoppel against statute. It is simply a case of admission and acceptance of fact.[5]

In *Tamil Nadu Supply and Drainage Board Engineers Association etc.* v. *Government of Tamil Nadu etc.*,[6] the Tamil Nadu Water Supply and Drainage Board has been established to serve the public interest by exposing better amenities of life. The

1. (1981) 1 LLJ 462 (Bombay).
2. *Ibid.*
3. (1995) 1 LLJ 486 (SC).
4. (1989) 1 Lab LJ 485 (Madras).
5. *Ibid.*
6. (1991) 2 Lab LJ 394 (Madras).

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function of the Board is to provide protected drinking water supply and drainage facilities. It has its own assets and liabilities, method of recovery of the cost of the schemes, making investments and constituting its funds. The Board has got a scheme of profit and loss. It shall earn profit in some year and loss in another year. It has got a capital structure, profit and liability and a labour force to care for. In view of all this it was held that the Board is an institution designed for profit in the limited sense that when the Government found it difficult to run such projects through its own department, they created a Board and transferred the projects to ensure that there was proper service to the community and at the same time there was no pressure on meager revenue and other resources of the State. Therefore, the employees of the Board qualifying for bonus under the Payment of Bonus Act are entitled to minimum amount of bonus and/or such amount computed in accordance with law upon the surplus in the accounting year.

An appeal was preferred to the Supreme Court against the above judgment of the Madras High Court and the Supreme Court in *Tamil Nadu Water Supply and Drainage Board* v. *T.N.W.S. and Board Engineers Association and others*,[1] held that there was no reason to interfere with the finding of the Madras High Court to the effect that the Board has been established to serve the public interest by ensuring better amenities of life and raising the standard of living of the community as a whole. The Board has its own assets and liabilities and it is an institution designed to earn profits. The Court observed that it is not in dispute that the appellant has been paying through not in the name of bonus every year either in the name of ex-gratia payment or under some other name. Therefore, the Court held the employees to be entitled to payment of bonus.

In *Co-operative Banks and Societies Employees' Federation, Maharashtra and others* v. *A.K. Thorat, Member, Industrial Tribunal and Another*,[2] it was held that having regard to the object of the society, the enactment under which it is established and particularly Sections 65 and 66 of the State Co-operative Societies Act the fact that the society has been making profits and is a credit society meant for advancing loans on interest and accepting deposits an inference could be drawn that it was established for the purpose of profits. That being so the society is not covered by Section 32(v)(e) of the Bonus Act.

In *Radhu K. Kakde of Bombay, Inhabitant Bombay* v. *Union of India & others*,[3] Canteen Stores Department is providing canteen facilities to the armed forces of the country. This facility was originally provided by a company and the business of the said company was taken over and run by the Government under the name of the Canteen Stores Department as a Government of India undertaking under the Control of Ministry of Defence. It was held that keeping in view the special nature of services rendered by the stores to the defence force it is clear that the Canteen Stores Department is an establishment engaged in an industry carried on by or under the authority of Ministry of Defence of the Central Government and hence is exempted from the application of Payment of Bonus Act.

In *National Dairy Development Board* v. *National Dairy Development Board Employees' Union, Ahmedabad*,[4] the Workmen of National Dairy Development raised an industrial dispute demanding maximum bonus for the year 1979-80 and the same was referred for adjudication. This claim was resisted by the Board on the ground that the provisions of the Act were not applicable to the Board because Board is not an establishment engaged in industry carried on by or under authority of the Agriculture Ministry and that the Board is an institution established for carrying on activities on no profit and no loss basis and hence exempted under Section 32(v)(c) of the Payment of Bonus Act. It was held that the National Dairy Development Board is an autonomous body registered under the Societies Registration Act and as charitable trust under the Bombay Public Trust Act, 1950 and it is governed by its own Memorandum of Associations. It is not a department of the Government

1. AIR 1998 SC 1737.
2. (1988) 2 Lab LJ 484 (Bombay).
3. (1986) 1 Lab LJ 300 (SC).
4. (1986) 1 Lab LJ 516 (Gujrat).

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although its activities are being carried on subject to the directions issued by the Central Government from time to time. It carries on commercial and industrial activities as per its own Article and Bye-laws as a separate juristic person. The Board is not acting as an agent of any department of the Central Government. Consequently it is not running any industry under the authority of the Department of the Central Government. The Memorandum and Articles of Association of the Board indicated that it is not an institution which is established not for the purpose of profits as required by Section 32(v)(c) of the Payment of Bonus Act. Hence the workmen are entitled to the bonus under the Act.

In *Sabanayagam, K.* v. *The Secretary to Government of Tamil Nadu Housing Development*,[1] the Tamil Nadu Housing Board is a statutory body engaged in the business of constructing houses and conveying the same to public for consideration. The Board has been paying bonus to employees of Cellulur Concerete Plant and Wood Working unit but not to other employees. The Secretary of the Diploma Engineers Association of the Board filed a writ petition claiming statutory minimum bonus. They agreed to pay minimum bonus for the year 1978-79 provided the employees gave up claim for such bonus for the previous years. After taking such commitment the Government issued a G.O. exempting the Housing Board from the applicability of this Act after the year 1977-78. Even thereafter the Board did not pay minimum bonus It was held that the Board comes within the provisions of Bonus Act and having provided for payment of bonus for its employees in its budget, it is not entitled to claim benefit of exemption under Section 32(v)(c). The Housing Board was held liable to pay minimum bonus of 8.33 per cent.

In *Workmen, B.S. Co.* v. *Bata Shoe Co.*,[2] a general bonus was payable to the workmen at the end of each quarter under an agreement dated 30-8-1962. The agreement was to be in force till 31-12-1965 unless it was superseded or amended. The workmen raised a dispute for a claim for bonus under the Payment of Bonus Act for the year 1964 in addition to that paid to them under the agreement. The company pleaded Section 32 as a bar to such a claim. The Supreme Court held that the claim of the workmen was barred by the agreement by virtue of Section 32. It was held that having regard to antecedent circumstances and the previous agreements the payment under the agreement was payment of bonus linked with the production or productivity and was made in lieu of bonus based on profits. Further, the payment of general bonus though made quarterly was an annual bonus within Section 32(vii)(a). The essential test of annual bonus is that the payment should ensure throughout the year and it should also be continued from year to year.

In order to invoke the bar under Section 32(vii)(a) of the Act the employers must establish that (i) there is existing operative agreement or settlement entered into prior to 29-5-1965 ; (ii) that it is one for payment of annual bonus ; (iii) the payment of bonus was linked with production and productivity , and the payment was in lieu of bonus based on profits.[3]

In *Rastriya Mill Mazdoor Sangh, Nagpur* v. *The Model Mills Nagpur and another*,[4] union of workmen made four references under Section 73-A of the Bombay Industrial Relations Act, 1946 against the management for grant of bonus for the period of 1964-65 to 1967-68. Bonus was demanded by the workmen according to the provisions of the Payment of Bonus Act, 1965. The contention of the employer was that by virtue of the appointment of an authorised controller under Section 18-A of the Industries (Development of Regulation) Act, 1951 in respect of an undertaking, the undertaking is run by the controller under the authority of a Department of the Central Government and hence is excluded from the application of the Bonus Act under Section 32(iv). It was held that on pure grammatical construction of sub-section (iv) of Section 32 it can not be said that on the appointment of an authorised controller the industrial undertaking acquires the status of being engaged in any industry carried on under the authority of the Central Government. The expression "carried on by or under the

1. (1984) 1 LLJ 87 (Madras).
2. AIR 1972 IC 1436.
3. *Ibid.*
4. (1984) 2 LLJ 507 (SC).

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authority of any department of the Central Government" qualifies the expression "Industry" and not the expression "Establishment" as used in Section 32(iv). It is in respect of employees of an industrial undertaking engaged in an industry carried on by or under the authority of any department of the Central Government as a whole and not Industrial Establishment. All Establishments in that industry which is carried on by or under the authority of the department of the Central Government would be excluded from the operation of the Bonus Act. On the facts of the case the Court came to the conclusion that if on the issue of a notified order appointing an authorised controller under Section 18-A, of the Industries (Development and Regulation) Act, the management of the industrial undertaking undergoes a change, yet it does not become an establishment engaged in an industry carried on by the department of the Central Government, its employees would not be excluded from the operation of the Bonus Act as provided in Section 32(iv).

34. Employees and employers not to be precluded from entering into agreements for grant of bonus under a different formula.—Nothing contained in this Act shall be construed to preclude employees employed in any establishment or class of establishments from entering into agreement with their employer for granting them an amount of bonus under a formula which is different from that under this Act :

Provided that no such agreement shall have effect unless it is entered into with the previous approval of the appropriate Government :

Provided further that any such agreement whereby the employees relinquish their right to receive the minimum bonus under sub-section (2-A) of Section 10 shall be null and void in so far as it purports to deprive them of such right :

Provided also that such employees shall not be entitled to be paid bonus in excess of—

(a) 8.33 per cent of the salary or wage earned by them during the accounting year if the employer has no allocable surplus in the accounting year or the amount of such allocable surplus is only so much that, but for the provisions of sub-section (2-A) of Section 10, it would entitle the employees only to receive an amount of bonus which is less than the aforesaid percentage ; or

(b) twenty per cent of the salary or wage earned by them during the accounting year.

The provisions of Section 34 of the Act would override any terms of the settlement which would be inconsistent with the provisions of the Act. Section 34 is on lines with Section 22 of the Payment of Wages Act. Section 34 confers protection to the workmen to enable them to workout their rights under the Act, even if they sign a settlement giving up their right under the Act. Hence the term in the settlement which prohibits the workmen from raising any dispute regarding bonus is of no avail to the management.[1]

In *Scindia Employees' Union and others* v. *Scindia Steam Navigation Co. Ltd.*,[2] two questions were to be decided : one whether employees drawing salary exceeding Rupees 1600 per month are entitled to bonus payable under settlement and second, whether certain allowance are to be included in the salary for the purposes of payment of bonus. It was held that the employees drawing salary exceeding Rupees 1600 will be entitled to receive bonus linked with dividend or the period covered by the settlement. They have not lost their right to receive bonus under the settlement by reason of the provisions of the Bonus Act even after the amendment thereof. It is true that this would result in somewhat anomalous situation *viz.*, that bonus linked to dividend would be

1. *Workmen of Modern Mills* v. *General Manager*, (1986) 2 Lab. L.J. 329 (Kar.).
2. (1983) 1 LLJ 547 (Bom).

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available and will have to be paid to the employees drawing higher salary and bonus at a lower rate or scale provided under the Act would be payable to employees drawing salary below rupees 1600.

It was further held that for the purposes of calculating the salary or wage of Rs. 1600 all the four allowances, *viz.*, (1) *ad hoc* allowance, (2) family allowance, (3) house rent allowance and (4) tiffin allowance will have to be included in spite of a contrary practice by the employer.

In *Basti Sugar Mills* v. *State of U.P.*,[1] the tripartite committee constituted under Section 3(c) of the U.P. Industrial Disputes Act, 1947 succeeded in bringing about an agreement in regard to the payment of bonus for the Session 1967-68 between the representatives of the employers and employees on the basis of Payment of Bonus Act, 1965, with certain modifications and adjustments. The said agreement was forwarded to the Government which in turn accepted the recommendations and issued an order under Section 3(b) incorporating and implementing those recommendations. It was held that :

> "There was a clear agreement for payment of bonus within the meaning of Section 34 of the Bonus Act between the employer the employees in the recommendations of the Tripartite committee and the incorporation of the same in the notification under Section 3(b) did not negate the anterior agreement between the parties".

It was further pointed out that "Section 34 of the Bonus Act has a monopolistic tendency of excluding other laws *vis-a-vis* profit sharing bonus. The basic condition for nullification of Section 3(b) of the U.P. Industrial Disputes Act is that, when it enters the area of bonus, it is inconsistent with the provisions of the Bonus Act. The analysis of the U.P. Act shows that there is no inconsistency between the provisions of U.P. Act and the Payment of Bonus Act. As such an agreement within the meaning of Section 34(1) could be spelt out of the notification under Section 3(b)".[2]

It was held in *Management of Kota Central Co-operative Bank Ltd.* v. *Judge, Industrial Tribunal & Another*,[3] that 'any other reserve' in item 2(d) of Schedule I does not include overdue interest in accounts maintained on cash basis.

In *Scindia Steam Navigation Co. Ltd.* v. *Scindia Employees' Union and others*,[4] the question was, whether an agreement linking bonus with dividend, can be enforced through a writ of *mandamus*. It was held that the terms of the agreement are in the nature of a settlement under Section 2(p) of the Industrial Disputes Act and by virtue of extension of Section 18(1) of the Industrial Disputes Act the terms of settlement are nothing more than a part of contract of employment. The provisions of Section 18(1) do not create a statutory duty against any party to the agreement. They create only a contractual obligation. It was further pointed out that the fact that a breach of settlement is made punishable by Section 29 cannot be taken as conclusive of an intention on the part of the Legislature to give a settlement, which, in essence, is nothing more than an agreement, the status of an instrument creating a statutory right or obligation. A writ cannot lie to enforce such a contractual obligation.

34-A. Effect of laws and agreements inconsistent with the Act.—Subject to the provisions of Sections 31-A and 34, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the terms of any award, agreement, settlement, or contract of service.

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1. AIR 1979 SC 262.
2. *Ibid.*
3. (1996) 1 LLJ 361 (Raj).
4. (1983) 2 LLJ 476 (Bom).

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In *S.S. Sandhu* v. *Fertilizer Corpn. of India*,[1] the Corporation, a Government Company made *ex-gratia* payments to its workmen in the past. With effect from April 1, 1965 the Company introduced a production bonus scheme. On December 2, 1965 the Central Cabinet took decision that competitive public sector undertakings which had made *ex-gratia* payments to their workmen in the past should continue to make that payment. The corporation offered the workmen the option of either accepting the cabinet decision or the production bonus scheme and the workmen opted in favour of the Cabinet decision. The statutory bonus of 4% payable according to the Payment of Bonus Act for the year 1965-66 came to 14.6 days basic wages plus dearness allowance. As the production for that year was less than the attainable production no production bonus was strictly payable to the workmen but the management with a view to preserve industrial harmony and peace decided, as a special case, to pay a minimum 3% production bonus which came to only 11 days basic wages plus dearness allowance. This coupled with statutory bonus of 4% aggregated to 25.6 days wages which fell short of the amount representing 30 days' wages paid to the workmen in the past years. Therefore, the management decided to give additional 4 days wages as advance production bonus "to be adjusted as and when total bonus payable to workers exceeds 30 days' wages in future and after communicating the decision to the workers it was paid accordingly. Therefore, a dispute arose as to the payment of *ex-gratia* bonus. The workers claimed that the introduction of the production bonus scheme did not detract from the *ex-gratia* payment of bonus which they were entitled to receive according to cabinet decision. The matter was referred to the Tribunal and after the decision of the Supreme Court in appeal against the award of the Tribunal, the Corporation issued circular to pay the arrears. While computing the arrears the Corporation adjusted the performance reward paid in 1964-65 and the production bonus paid in 1965-66 and paid only the balance together with interest to such of the workers as were found entitled to the same. The workers claimed that they were entitled to receive *ex-gratia* payment of bonus in addition to statutory bonus, making up to the aggregate of 30 days' wages unaffected by the production bonus scheme.

It was held that the amounts payable by way of bonus for the years 1964-65 and 1965-66 according to the decision of the Supreme Court, were fully paid to the workmen and their claim for payment of any further amount was unjustified. The performance bonus was paid to the workman *ex-gratia*. It was right to treat the amount of performance reward as part of bonus payable on the basis of cabinet decision.

Further the workmen were given a choice between bonus payable according to the cabinet decision and statutory bonus plus production bonus according to the scheme. Since the workmen opted in favour of cabinet decision they could not claim production bonus in addition. The amount of production bonus was accordingly liable to be taken into account in computing bonus payable to them under the cabinet decision.

Section 34-A (old Section 34) only emphasises the importance of the obligation of the employer, in every case, to pay the statutory bonus. The section does not destroy the survival of other types of bonus than provided by the Bonus Act.[2]

35. Saving.—Nothing contained in this Act shall be deemed to affect the provision of the Coal Mines Provident Fund and Bonus Scheme Act, 1948 or of any scheme made thereunder.

36. Power of exemption.—If the appropriate Government, having regard to the financial position and other relevant circumstances of any establishment or class of establishments, is of opinion that it will not be in public interest to apply all or any of

1. AIR 1974 SC 1967.
2. *Mumbai Kamgar Sabha* v. *Adbulbhai*, AIR 1976 SC 1455.

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the provisions of this Act thereto, it may by notification in the Official *Gazette*, exempt for such period as may be specified therein and subject to such conditions as it may think fit to impose, such establishment or class of establishments from all or any of the provisions of this Act.

In *Associated Publishers (Madras) Ltd.* v. *Government of Tamil Nadu and others*[1] the scope of Section 36 has been examined. It was held that it was within the domain of the Government either to grant or refuse exemption. What is important is whether the State had taken into account the relevant aspects in refusing or granting exemption. In the instant case the Associated Publishers placed only the financial position and no other relevant circumstances before the State Government. Therefore, when the petitioner has not discharged the onus placed on him and failed to furnish materials about other relevant circumstances, the impugned order of the Government cannot be said to have been passed without any basis. If the exemption is granted on the ground of public interest, the Government must spell out the aspect of public interest failing which an order would be contrary to public interest. The words "public interest" need not be used when the liability to pay which is already thereunder the Act, continues.

In *Associated Publishers (Madras) Ltd.* v. *Government of Tamil Nadu and others*,[2] the Madras High Court had to determine whether the Government's refusal to grant exemption to the appellant under Section 10 of the Payment of Bonus Act in exercise of its powers under Section 36 is valid. The Court held that the manner in which Section 36 is couched had its own significance. The Government must be of the opinion that it will not advance public interest to apply all or any of the provisions and if such opinion is formed, the Government is bound to grant exemption. It follows, therefore, that in a converse case, the Government is justified in refusing exemption. There are two stages in Section 36 ; the first is that the Government shall consider the financial position and other relevant circumstances of an establishment or class of establishments. The second stage is that it should be of the opinion that it would not be in the public interest to apply all or any of the provisions of the Act. Where it is clear that any amount of exemption from any or all provisions of the Act, by the Government in exercise of their powers under Section 36 will not revive the company, the grant of exemption will not promote public interest, and refusal to grant exemption will be valid.

In *Tamil Nadu State Housing Board, State of Tamil Nadu* v. *K. Sabanayagam*,[3] it was held that the Payment of Bonus Act confers the benefit of bonus to persons employed in the establishments covered by the Act. Therefore, if the said persons are to be denied bonus by granting exception, the employees must be heard and any exemption granted under Section 36 of the Act without hearing the employees is totally without jurisdiction. Similarly for granting exemption retrospectively, there must be specific authorisation under the statute. If no such power to grant exemption retrospectively is given by the statute, the order of exemption will be illegal. Section 36 does not empower the Government to give exemption retrospectively.

38. Power to make rules.—(1) The Central Government may make rules for the purposes of carrying into effect the provisions of the Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the authority for granting permission under the proviso to sub-clause (iii) of clause (1) of Section 2 ;

(b) the preparation of registers, records and other documents and the form and

1. (1982) 2 LLJ 107 (Madras).
2. (1985) 1 LLJ 69 (Madras).
3. (1989) 1 Lab LJ 485 (Madras).

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manner in which such registers, records and documents may be maintained under Section 26 ;

(c) the powers which may be exercised by an Inspector under clause (e) of sub-section (2) of Section 27 ; and

(d) any other matter which is to be, or may be, prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions and if before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

39. Application of certain laws not barred.—Save as otherwise expressly provided, the provisions of this Act shall be in addition to and not in derogation of the Industrial Disputes Act, 1947, or any corresponding law relating to investigation and settlement of industrial disputes in force in a State.

Section 39 of the Payment of Bonus Act, expressly saves the application of the provisions of the Industrial Disputes Act to such claims by declaring that the provision of the Payment of Bonus Act shall be in addition to and not in derogation of the Industrial Disputes Act. Section 33-C(2) of the Industrial Disputes Act must therefore be held applicable to such claims inasmuch as no provision of the Industrial Disputes Act expressly provides otherwise. In other words, the provision contained in Section 33-C(2) cannot be deemed to be excluded by necessary implication or by any fiction of law.[1]

40. Repeal and saving.—(1) The Payment of Bonus Ordinance, 1965, is hereby *repealed*.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act as if this Act had commenced on the 29th May, 1965.

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1. *Anand Oil Industries* v. *Labour Court, Hyderabad*, AIR 1979 AP 182.

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THE APPRENTICES ACT, 1961

CHAPTER I
PRELIMINARY

Section 1. Object and Scope.—The question of undertaking legislation for regulating the training of apprentices in industry has been under the consideration of the Government for a long time. Expert Committee which went into the question have recommended such legislation. Although certain establishments in the public and private sectors have been carrying out programmes of training of skilled workers on a systematic basis, industry in general has not yet fully organised such programmes. In the context of the Five Year Plan and the large scale industrial development of the country, there is an increasing demand for skilled craftsmen.

The Government considered it necessary to utilise the facilities available for the training of apprentices. Therefore to ensure their training in accordance with the programmes, standards and syllabi drawn up by expert bodies, the Apprentices Act was enacted in the year 1961. The object of the Act is to meet an increasing demand for skilled craftsmen, in the development of the country. The Act provides for the regulation and control of training of apprentices in trades and for matters connected therewith.

This Act extends to the whole of India. It came into force on 1st March, 1962. Sub-section (4) of Section 1 provides that the provisions of this Act shall not apply to—

(a) any area or to any industry in the area unless the Central Government by notification in the Official Gazette specifies the area or industry as an area or industry to which the said provisions shall apply with effect from such date as may be mentioned in the notification ;

(b) any such special apprenticeship scheme for imparting training to apprentices as may be notified by the Central Government in the Official Gazette.

The Apprentices Act does not apply to contracts of personal service entered on behalf of minors. Such contracts do not stand on the same footing as contract of apprentice or contract of marriage of minor.[1]

Unless the Central Government issues a notification specifying the trade, occupation or subject field of the Corporation as 'designated trade' for the purpose of the Apprentices Act, 1961, the trade, occupation or subject field of the corporation is not designated trade and the provisions of the aforesaid Act shall not apply.[2]

Section 2. Definitions.—In this Act, unless the context otherwise requires—

(a) **"All India Council"** means the All India Council of Technical Education established by the resolution of the Government of India in the former Ministry of Education No. F. 16-10-44-E, III, dated the 30th November, 1945.

(aa) **"Apprentices"** means a person who is undergoing apprenticeship training in pursuance of a contract of apprenticeship.

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1. *Raj Rani* v. *Prem Adbi*, AIR 1949 Bom 215.
2. *Patel Pravin Kumar Somnath & others* v. *Gujarat State Land Development Corpn. Ltd. & others*, (1993) 1 LLJ 916 (Guj).

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"Apprentice" under this Act "means a person who is undergoing apprenticeship training in the designated trade in pursuance of a contract of apprenticeship". It is, therefore, inherent in the word "apprentice, that there is no element of employment as such in a trade or industry but only an adequate well-guarded provision for training to enable the trainee after completion of his course to be suitably absorbed in earning employment as a regular worker. The fact that a trainee may have been absorbed in the company where he is undergoing the training, is not relevant for the purpose of comprehending the content of the time".[1]

"The heart of the matter in apprenticeship, is, therefore, the dominant object, an intent to impart on the part of the employer and to accept on the part of the other person learning under certain agreed terms. That certain payment is made during the apprenticeship by whatever name called, and that the apprentice has to be under certain rules of discipline to convert the apprentice into a regular employee under the employer. Such a person remains a learner and is not an employee".[2]

"When under the terms and conditions of agreement under which apprentices are engaged by a company there are mere trainees for a particular period for a distinct purpose and the company is not bound to employ them in their work after the training period is over, such apprentices cannot be said to be employed in the work of the company or in connection with the work of the company more so when they are not given wages defined in Section 2(22). Thus, an apprentice is not an employee within Section 2(9) of the Act."[3]

In *Bhaskaran* v. *Kerala State Electricity Board*,[4] apprentices were recruited by Kerala State Electricity Board by entering into a contract of apprenticeship. Services of such apprentices were terminated without complying with the provisions of Section 25-F of the Industrial Disputes Act. Contract of apprenticeship was not registered as required by Section 4 of the Apprentices Act, 1961. Termination of services was challenged through a writ petition. It was held that in order to answer the definition of apprentice, two conditions are to be satisfied *viz.*, (1) that the person is undergoing the apprenticeship training and (2) that he is undergoing such training in pursuance of contract of apprenticeship. It is not necessary that the contract of apprenticeship should have been registered as required by Section 4(4) of the Apprentices Act, 1961. If that was the intention of the Legislature the word "registered" would have been used before the word "contract" in Section 2(aa) of the Act. Thus it is clear that registration of contract of apprenticeship is not necessary for answering the definition of "Apprentice". It is the existing contract of apprenticeship that is required to be registered and not that such a contract becomes a contract of apprenticeship only after it is registered. It is enough if a contract of apprenticeship is entered into and training is undergone in pursuance of such a contract. Hence the provisions of Section 18 of the Apprentices Act come into operation and therefore the concerned persons cannot be regarded as workers and the provisions of Section 25-F of the Industrial Disputes Act, 1947 are not attracted. Therefore the termination is valid.

(aaa) **"Apprenticeship training"** means a course of training in any industry or establishment undergone in pursuance of a contract of apprenticeship and under prescribed terms and conditions which may be different for different category of apprentices.

(b) **"Apprenticeship Adviser"** means the Central Apprenticeship Adviser appointed under sub-section (1) of Section 26 or the State Apprenticeship

1. *E.S.I. Corporation* v. *Tata Engg. & Co.*, AIR 1976 SC 66.
2. *Ibid.*
3. *Ibid.*
4. (1986) 2 Lab LJ 346 (Kerala).

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Adviser appointed under sub-section (2) of that section.

(c) **"Apprenticeship Council"** means the Central Apprenticeship Council or the Apprenticeship Council established under sub-section (1) of Section 24.

(d) **"Appropriate Government"** means–

(1) in relation to—

(a) the Central Apprenticeship Council, or

(aa) the Regional Boards, or

(aaa) the practical training of graduate or technical apprentices or of technician (vocational) apprentices, or

(b) any establishment of any railway, major port, mine or oil field, or

(c) any establishment owned, controlled or managed by—

(i) the Central Government or a department of the Central Government,

(ii) a company in which not less than fifty per cent of the share capital is held by the Central Government or partly by that Government and partly by one or more State Governments,

the Central Government :

(2) in relation to—

(a) a State Apprenticeship Council, or

(b) any establishment other than an establishment specified in sub-clause (1) of this clause,

the State Government.

(dd) **"Board or State Council of Technical Education"** means the Board or the State Council of Technical Education established by State Government.

(e) **"Designated trade"** means any trade or occupation or any subject field in engineering or technology or any vocational course which the Central Government after consultation with the Central Apprenticeship Council, may, by notification in the Official Gazette specify as a designated trade for the purposes of this Act.

(f) **"Employer"** means any person who employs one or more other person to do any work in an establishment for remuneration and includes any person entrusted with the supervision and control of employee in such establishment.

(g) **"Establishment"** includes any place where industry is carried on and where an establishment consists of different departments or has branches, whether situated in the same place or at different places, all such departments or branches shall be treated as part of that establishment.

(h) **"Establishment in private sector"** means an establishment which is not establishment in public sector.

(i) **"Establishment in public sector"** means an establishment which is owned, control or managed by—

(1) the Government or a department of the Government ;

(2) a Government company as defined in Section 17 of the Companies Act, 1956 ;

(3) a corporation (including a co-operative society) established by or under a Central, Provincial or State Act, which is owned, controlled or managed by the Government ;

(4) a local authority.

(j) **"Graduate or technician apprentice"** means an apprentice who holds or is

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undergoing training in order that he may hold a degree or diploma in engineering or technology or equivalent qualification generally by any institution recognised by the Government and undergoes apprenticeship training in any such subject-field in engineering or technology as may be prescribed.

(k) **"Industry"** means any industry or business in which any trade, occupation or subject-field in engineering or technology or any vocational course may be specified as a designated trade.

(l) **"National Council"** means the National Council for Training in Vocational Trades established by the resolution of the Government of India in the Ministry of Labour (Directorate General of Resettlement and Employment) No. TR/EP. 24/56, dated the 21st August, 1956 and re-named as the National Council for Vocational Training by the resolution of the Government of India in the Ministry of Labour (Directorate General of Employment and Training) No. DGET/12/21/80—TC, dated the 30th September, 1981.

(m) **"Prescribed"** means prescribed by rules made under this Act.

(mm) **"Regional Board"** means any Board of Apprenticeship Training registered under the Societies Registration Act, 1860 at Bombay, Calcutta, Madras or Kanpur.

(n) **"State"** includes a Union territory.

(o) **"State Council"** means a State Council for Training, or Vocational Trades established by the State Government.

(p) **"State Government"** in relation to a Union territory means the Administrator thereof.

(pp) **"Technician (vocational) apprentice"** means an apprentice who holds or is undergoing training in order that he may hold a certificate in vocational course involving two years of study after the completion of the secondary stage of school education recognised by the All India Council and undergoes apprenticeship training in any such subject-field in any vocational course as may be prescribed.

(q) **"Trade-Apprentice"** means an apprentice who undergoes apprenticeship training in any such trade or occupation as may be prescribed.

(r) **"Worker"** means any person who is employed for wages in any kind of work and who gets his wages directly from the employer but shall not include an apprentice referred to in clause (aa).

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CHAPTER II
APPRENTICES AND THEIR TRAINING

Section 3. Qualifications for being engaged as an apprentice.—A person shall not be qualified for being engaged as an apprentice to undergo apprenticeship training in any designated trade, unless he—

(a) is not less than fourteen years of age, and

(b) satisfies such standards of education and physical fitness as may be prescribed :

Provided that different standards may be prescribed in relation to apprenticeship training in different designated trade and for different categories apprentices.

Section 3-A.—(1) In every designated trade, training places shall be reserved by the employer for the Scheduled Castes and the Scheduled Tribes and where there is more than one designated trade in an establishment, such training places shall be reserved also on the basis of the total number of apprentices in all the designated trades in such establishment.

(2) The number of training places to be reserved for the Scheduled Castes and the Scheduled Tribes under sub-section (1) shall be such as may be prescribed, having regard to the population of the Scheduled Castes and the Scheduled Tribes in the State concerned.

Explanation.—In this section, the expressions "Scheduled Castes" and "Scheduled Tribes" shall have the meaning as in clauses (24) and (25) of Article 366 of the Constitution.

Section 4. Contract of apprenticeship.—(1) No person shall be engaged as an apprentice to undergo apprenticeship training in a designated trade unless such person or, if he is minor, his guardian has entered into a contract of apprenticeship with the employer.

(2) The apprenticeship training shall be deemed to have commenced on the date on which the contract of apprenticeship has been entered into under sub-section (1).

(3) Every contract of apprenticeship may contain such terms and conditions as may be agreed to by the parties to the contract :

Provided that no such terms or conditions shall be inconsistent with any provision of this Act or any rule made thereunder.

(4) Every contract of apprenticeship entered into under sub-section (1) shall be sent by the employer within such period as may be prescribed to the Apprenticeship Adviser for registration.

(5) The Apprenticeship Adviser shall not register a contract of apprenticeship unless he is satisfied that the person described as an apprentice in the contract is qualified under this Act for being engaged as an apprentice to undergo apprenticeship training in the designated trade specified in the contract.

(6) Where the Central Government after consulting the Central Apprenticeship Council, makes any rule varying the terms and conditions of apprenticeship training of any category of apprentices undergoing such training then, the terms and conditions of every contract of apprenticeship relating to that category of apprentices and subsisting

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immediately before the making of such rule shall be deemed to have been modified accordingly.

In *Raj Kumar Srivastava* v. *State of U.P., and others*,[1] the petitioner was engaged as an apprentice by respondent No. 3. He claimed that there was no valid and legal contract of apprenticeship for the reason that a contract made in the first instance was cancelled and a second contract was antedated. He contended that his services could be terminated only after notice and payment of retrenchment compensation under the Industrial Disputes Act. It was held that the petitioner had himself applied for engagement as an apprentice under the Apprentices Act, 1961 and had signed both the contracts under the provisions of the Act, particularly Section 18 which declares that every apprentice undergoing training shall be trainee and not a worker. Therefore the petitioner was rightly held not to be a workman.

Section 5. Novation of contract of apprenticeship.—Where an employer with whom a contract of apprenticeship has been entered into, is for any reason unable to fulfil his obligations under the contract and with the approval of the Apprenticeship Adviser it is agreed between the employer, the apprentice or his guardian and other employer that the apprentice shall be engaged as an apprentice under the other employer for the unexpired portion of the period of apprenticeship training, the agreement, on registration with the Apprenticeship Adviser, shall be deemed to be the contract of apprenticeship between the apprentice or his guardian and the other employer, and on and from the date of such registration, the contract of apprenticeship with the first employer shall terminate and no obligation under that contract shall be enforceable at the instance of any party to the contract against the other party thereto.

Section 6. Period of apprenticeship training.—The period of apprenticeship training which shall be specified in the contract of apprenticeship shall be as follows :

(a) in the case of trade apprentices who, having undergone institutional training in a school or other institution recognised by the National Council, have passed the trade test or examinations conducted by that Council, the period of apprenticeship training shall be such as may be determined by that Council or by an institution recognised by that Council ;

(aa) in the case of trade apprentices who having undergone institutional training in a school or other institution affiliated to or recognised by a Board or State Council of Technical Education or any other authority which the Central Government may, by notification in the Official Gazette specify in this behalf, have passed the trade tests or examinations conducted by that Board or State Council or authority, the period of apprenticeship training shall be such as may be prescribed ;

(b) in the case of other trade apprentice the period of apprenticeship training shall be such as may be prescribed ;

(c) in the case of graduate or technician apprentices, or technician (vocational) apprentices the period of apprenticeship training shall be such as may be prescribed.

Section 7. Termination of apprenticeship contract.—(1) The contract of apprenticeship shall terminate on the expiry of the period of apprenticeship training.

(2) Either party to contract of apprenticeship may make an application to the Apprenticeship Adviser for the termination of the contract, and when such application is made, shall send by post a copy thereof to the other party to the contract.

(3) After considering the contents of the application and the objections, if any, filed by the other party, the Apprenticeship Adviser may, by order in writing, terminate

1. (1996) 1 LLJ 1054 (All).

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the contract if he is satisfied that the parties to the contract or any of them have or has failed to carry out the terms and conditions of the contract and that it is desirable in the interest of the parties or any of them to terminate the same :

Provided where a contract is terminated—

(a) for failure on the part of the employer to carry out the terms and conditions of the contract, the employer shall pay to the apprentice such compensation as may be prescribed ;

(b) for such failure on the part of the apprentice, the apprentice or his guardian shall refund to the employer as cost of training such amount as may be determined by the Apprenticeship Adviser.

(4) Notwithstanding anything contained in any other provision of this Act, where a contract of apprenticeship has been terminated by the Apprenticeship Adviser before the expiry of the period of apprenticeship training and a new contract of apprenticeship is being entered into with a new employer, the Apprenticeship Adviser may, if he is satisfied that the contract of apprenticeship with the previous employer could not be completed because of any lapse on the part of the previous employer, permit the period of apprenticeship training already undergone by the apprentice with his previous employer to be included in the period of apprenticeship training to be undertaken with the new employer.

Section 8. Number of apprenticeship for designated trade.—(1) The Central Government shall, after consulting the Central Apprenticeship Council by order notified in the Official Gazette, determine for each designated trade the ratio of trade apprentices to workers other than unskilled workers in the trade :

Provided that nothing contained in this sub-section shall be deemed to prevent any employer for engaging a number of trade apprentices in excess of the ratio determined under this sub-section.

(2) In determining the ratio under sub-section (1), the Central Government shall have regard to the facilities available for apprenticeship training under this Act in the designated trade concerned as well as to the facilities that may have to be made available by an employer for the training of graduates or technician apprentices, or technician (vocational) apprentices if any, in pursuance of any notice issued to him under sub-section (3-A) by the Central Apprenticeship Adviser or such other person as referred to in that sub-section.

(3) The Apprenticeship Adviser may, by notice in writing, require an employer to engage such a number of trade apprentices within the ratio determined by the Central Government for any designated trade in his establishment to undergo apprentices training in that trade and the employer shall comply with such requisition :

Provided that in making any requisition under this sub-section, the Apprenticeship Adviser shall have regard to the facilities actually available in the establishment concerned.

Provided further that the Apprenticeship Adviser may, on a representation made to him by an employer and keeping in view the more realistic employment potential, training facilities and other relevant factors, permit him to engage such number of apprentices for a designated trade as is lesser than the number arrived at by the ratio for that trade, not being lesser than twenty per cent of the number so arrived at, subject to the condition that the employer shall engage apprentices in other trades in excess in number equivalent to such shortfall.

(3-A) The Central Apprenticeship Adviser or any other person not below the rank of an Assistant Apprenticeship Adviser authorised by the Central Apprenticeship Adviser in writing in this behalf shall having regard to—

(i) the number of managerial persons (including technical and supervisory persons) employed in a designated trade ;

(ii) the number of management trainees engaged in the establishment ;

(iii) the totality of the training facilities available in a designated trade ; and

(iv) such other factors as he may consider fit in the circumstances of the case may, by notice in writing, requiring an employer to impart training to such number

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of graduates or technician apprentices or technician (vocational) apprentices in such trade in his establishment as may be specified in such notice and the employer shall comply with such requisition.

Explanation.—In this sub-section the expression "management trainee" is a person who is engaged by an employer for undergoing a course of training in the establishment of the employer (not being apprenticeship training under this Act) subject to the condition that on successful completion of such training such person shall be employed by the employer on a regular basis.

(4) Several employers may join together for the purpose of providing practical training to the apprentices under them by moving them between their respective establishments.

(5) Where having regard to the public interest, a number of apprentices in excess of the ratio determined by the Central Government or in excess of the number specified in a notice issued under sub-section (3-A) should in the opinion of the appropriate Government be trained, the appropriate Government may require employers to train the additional number of apprentices.

(6) Every employer to whom such requisition as aforesaid is made, shall comply with the requisition, if the Government concerned makes available additional facilities and such additional financial assistance as are considered necessary by the Apprenticeship Adviser for the training of the additional number of apprentices.

(7) Any employer not satisfied with the decision of the Apprenticeship Adviser under sub-section (6) may make a reference to the Central Apprenticeship Council and such reference shall be decided by a Committee thereof appointed by that Council for the purpose and the decision of the Committee shall be final.

In *M/s. Swaraj Motor Works, Trunk Road, Guntur* v. *Union of India*,[1] the constitutional validity of this section was challenged. It was held that "Article 14, only forbids classification but does not forbid reasonable classification for the purpose of legislation. The classification, however, must be based on intelligible differentia which distinguishes person or that are grouped together from others left out of the group and the differntia must have a rational relation to the object sought to be achieved by the statute in question. In the present case, in the interests of the general trade and business apprentices are sought to be trained by a particular trade and the ratio is fixed under the provisions of Section 8(1) by the Government after consulting the Central Apprenticeship Council which consists of members appointed by the State and Central Governments, representatives of employers and members having special knowledge in matters relating to industry and labour. Under Section 8(5) the apprentices sent within the ratio are to be paid by the employer himself, taking into consideration the number of apprentices sent to him for training depending on the number of employees that he has already employed. In this case admittedly the petitioner has 17 employees under him out of whom, even according to his own statement, four are mechanics. As the ratio has been fixed at 1 : 4 only one mechanic has been allotted to him for being trained. This has been done taking into consideration the financial capacity to entertain that apprentice from whom he also extracts some services. Under Section 8(6) if an additional burden is sought to be placed on him by allotting more apprentices than is provided for under the ratio fixed, additional financial assistance by the Government is contemplated. This is reasonable as he is saddled with additional liability obviously beyond his means and liabilities are to be borne by the Government. This is an intelligible differentia based on the objects sought to be achieved by the State in question. Therefore, it cannot be said to offend Article 14 of the Constitution.

It was held in *M.P. Electricity Board and others* v. *Basant Kumar Pandey*,[2] that in order to attract the provisions of Apprentices Act, 1961 it is necessary that the person claiming to be an apprentice is undergoing apprenticeship training in a designated trade in

1. (1972) Lab I IC 1448.
2. (1991) I Lab LJ 323 (MP).

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an establishment as defined in the Act. In the instant case M.P. Electricity Board has not been notified by the Central Government in the Official Gazette as designated trade, hence the two respondents are not apprentices.

Section 9. Practical and basic training of apprentices.—(1) Every employer shall make suitable arrangement in his workshop for imparting a course of practical training to every apprentice engaged by him in accordance with the programme approved by the Apprenticeship Adviser.

(2) The Central Apprenticeship Adviser or any other person not below the rank of an Assistant Apprenticeship Adviser authorised by the Central Apprenticeship Adviser in writing in this behalf shall be given all reasonable facilities for access to each such apprentice with a view to test his work and to ensure that the practical training is being imparted in accordance with the approved programme :

Provided that the State Apprenticeship Adviser or any other person not below the rank of an Assistant Apprenticeship Adviser authorised by the State Apprenticeship Adviser in writing in this behalf shall also be given such facilities in respect of apprentices undergoing training in establishments in relation to which the appropriate Government is the State Government.

(3) Such of the trade apprentices as have not undergone institutional training in a school or other institution recognised by the National Council or any other institution affiliated to or recognised by a Board or State Council of Technical Education or any other authority which the Central Government may, by notification in the Official Gazette, specify in this behalf, shall, before admission in the workshop for practical training, undergo a course of basic training.

(4) Where an employer employs in his establishment five hundred or more workers, the basic training shall be imparted to the trade apprentices either in separate parts of the workshop building or in a separate building which shall be set up by the employer himself, but the appropriate Government may grant loans to the employer on easy terms and repayable by easy instalments to meet the cost of land, construction and equipment for such separate building.

(4-A) Notwithstanding anything contained in sub-section (4) if the number of apprentices to be trained at any time in any establishment in which five hundred or more workers are employed, is less than twelve, the employer in relation to such establishment may depute all or any of such apprentices to any Basic Training Centre or Industrial Training Institute for basic training in any designated trade, in either case, run by the Government.

(4-B) Where an employer deputes any apprentice under sub-section (4-A), such employer shall pay to the Government the expenses incurred by the Government on such training, at such rate as may be specified by the Central Government.

(5) Where an employer employs in his establishment less than five hundred workers, the basic training shall be imparted to the trade apprentices in training institutes set up by the Government.

(6) In any such training institute, which shall be located within the premises of the most suitable establishment in the locality or at any other convenient place, the trade apprentices engaged by two or more employers may be imparted basic training.

(7) The syllabus of, and the equipment to be utilised for, practical training including basic training shall be such as may be approved by the Central Government in consultation with the Central Apprenticeship Council.

(7-A) In the case of graduate or technician apprentices or technician (vocational) apprentices the programme of apprenticeship training and the facilities required for such training in any subject-field in engineering or technology or vocational course shall be such as may be approved by the Central Government in consultation with the Central Apprenticeship Council.

(8)(a) Recurring costs (including the cost of stipends) incurred by an employer in connection with basic training imparted to trade apprentices other than those

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referred to in clauses (a) and (aa) of Section 6 shall be borne—

(i) if such employer employs two hundred and fifty workers or more, by the employer ;

(ii) if such employer employs less than two hundred and fifty workers, by the employer and the Government in equal shares upto such limit as may be laid down by the Central Government and beyond that limit by the employer alone ; and

(b) Recurring costs (including the cost of stipends), if any, incurred by an employer in connection with practical training including basic training imparted to trade apprentices referred to in clauses (a) and (aa) of Section 6 shall in every case, be borne by the employer.

(c) Recurring costs (excluding the cost of stipends) incurred by an employer in connection with the practical training imparted to graduate or technician apprentices or technician (vocational) apprentices shall be borne by the employer and the cost of stipends shall be borne by the Central Government and the employer in equal shares up to such limit as may be laid down by the Central Government and beyond that limit by the employer alone.

Section 10. Related instruction of apprentices.—(1) A trade apprentice who is undergoing practical training in an establishment shall, during the period of practical training, be given a course of related instruction (which shall be appropriate to the trade) approved by the Central Government in consultation with the Central Apprenticeship Council, with a view to giving the apprentice such theoretical knowledge as he needs in order to become fully qualified as a skilled craftsman.

(2) Related instruction shall be imparted at the cost of the appropriate Government but the employer shall, when so requested afford all facilities for imparting such instruction.

(3) Any time spent by a trade apprentice in attending classes on related instruction shall be treated as part of his paid period of work.

(4) In the case of trade apprentices who, after having undergone a course of institutional training, have passed the trade tests conducted by the National Council or have passed the trade tests and examination conducted by a Board or State Council of Technical Education or any other authority which the Central Government may, by notification in the Official Gazette, specify in this behalf, the related instruction may be given on such reduced or modified scale as may be prescribed.

(5) Where any person has during his course in a technical institution become a graduate or technician apprentice or technician (vocational) apprentice and during his apprenticeship training he has to receive related instruction, then, the employer shall release such person from practical training to receive the related instruction in such institution, for such period as may be specified by the Central Apprenticeship Adviser or by any other person not below the rank of Assistant Apprenticeship Adviser authorised by the Central Apprenticeship Adviser in writing in this behalf.

Section 11. Obligations of employers.—Without prejudice to the other provisions of this Act, every employer shall have the following obligations in relation to an apprentice, namely :

(a) to provide the apprentice with the training in his trade in accordance with the provisions of this Act, and the rules made thereunder ;

(b) if the employer is not himself qualified in the trade, to ensure that a person who possesses the prescribed qualifications is placed in charge of the training of the apprentice ;

(bb) to provide adequate instructional staff, possessing such qualifications as may be prescribed, for imparting practical and theoretical training and facilities for trade test of apprentices ; and

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(c) to carry out his obligations under the contract apprenticeship.

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In *M/s. Swaraj Motor Works, Trunks Road Guntur* v. *Union of India*,[1] it was held that "the entire Act is designed to advance industrial progress by providing properly trained apprentices. It is in the interests of the general public that the declaration of a particular trade has been made as a designated trade and in fixing the ratio sufficient care has been taken in the Act to see that the public as well as representatives of the trades and Officers of the Government are all associated and sufficient guidelines have been provided for the selection of the trade as well as the ratio to be fixed. Section 11 makes it obligatory on the employer to provide training for the apprentice and Section 13 provides for the remuneration. The relationship between the employer and the apprentice is provided for by section 12 under a contract of apprenticeship. Though the restriction may, to some extent, interfere with the freedom of trade or business guaranteed under Article 19(1)(g) of the Constitution, they are reasonable as they are in the interests of trade and business and as such the interests of the general public are protected by the terms of Clause (6) of Article 19. The fact that an individual employer finds it difficult to employ additional labour as an apprentice cannot be a reason for striking down the law as unreasonable".

Section 12. Obligations of apprentices.—(1) Every apprentice undergoing apprenticeship training shall have the following obligations, namely :

(a) to learn his trade conscientiously and diligently and endeavour to qualify himself as a skilled craftsman before the expiry of period of training ;

(b) to attend practical and instructional classes regularly ;

(c) to carry out all lawful orders of his employer and superiors in the establishment ; and

(d) to carry out his obligations under the contract of apprenticeship.

(2) Every graduate or technician apprentice or technician (vocational) apprentice undergoing apprenticeship training shall have the following obligations, namely :

(a) to learn his subject-field in engineering or technology or vocational course conscientiously and diligently at his place of training ;

(b) to attend the practical and instructional classes regularly ;

(c) to carry out all lawful orders of his employer and superiors in the establishment ;

(d) to carry out his obligations under the contract of apprenticeship which shall include the maintenance of such records of his work as may be prescribed.

Section 13. Payment of apprentices.—(1) The employer shall pay to every apprentices during the period of apprenticeship training such stipend at a rate not less than the prescribed minimum rate, or the rate which was being paid by the employer on 1st January, 1970 to the category of apprentices under which such apprentice falls, whichever is higher, as may be specified in the contract of apprenticeship and the stipend so specified shall be paid at such intervals and subject to such conditions as may be prescribed.

(2) An apprentice shall not be paid by employer on the basis of piece-work nor shall he be required to take part in any output bonus or other incentive scheme.

Section 14. Health, safety and welfare of apprentices.—When any apprentices are undergoing training in a factory, the provisions of Chapters III, IV and V of the Factories Act, 1948 shall apply in relation to the health, safety and welfare of the apprentices as if they were workers within the meaning of that Act and when any apprentices are undergoing training in a mine, the provisions of Chapter V of the Mines Act, 1952, shall apply in relation to the health and safety of the apprentices as if they were persons employed in the mine.

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1. (1972) Lab IC 1448.

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Section 15. Hours of work, overtime, leave and holidays.—(1) The weekly and daily hours of work of an apprentice while undergoing practical training in a workshop shall be such as may be prescribed.

(2) No apprentice shall be required or allowed to work overtime except with the approval of the Apprenticeship Adviser who shall not grant such approval unless he is satisfied that such overtime is in the interest of the training of the apprentice or in the public interest.

(3) An apprentice shall be entitled to such leave as may be prescribed and to such holidays as are observed in the establishment in which he is undergoing training.

Section 16. Employer's liability for compensation for injury.—If personal injury is caused to an apprentice by accident arising out of and in the course of his training as an apprentice, his employer shall be liable to pay compensation which shall be determined and paid, so far as may be in accordance with the provisions of the Workmen's Compensation Act, 1923 subject to the modifications in the Schedule.

Section 17. Conduct and discipline.—In all matters of conduct and discipline the apprentice shall be governed by the rules and regulations applicable to employees of the corresponding category in the establishment in which the apprentice is undergoing training.

Section 18. Apprentices are the trainees and not workers.—Save as otherwise provided in this Act,—

(a) every apprentice undergoing apprenticeship training in a designated trade in an establishment shall be a trainee and not a worker ; and

(b) the provisions of any law with respect to labour shall not apply to or in relation to such apprentice.

In *M/s. Tannery & Footwear Corporation of India Ltd.* v. *Labour Court, Kanpur II & others*,[1] the question was whether an apprentice under the Apprentices Act can become a regular workman by merely discharging the functions of a regular mechanic during the training period. It was held that an apprentice under the Apprentices Act would not become an apprentice for the purpose of Section 2(s) of the Industrial Disputes Act. The word apprentice is used with different connotation and meaning under the two Acts. Having accepted involvement as an apprentice and having undergone training as such, the respondent can not turn round and say that he became a regular employee merely because he was put in charge of some work by the petitioner. There was no master servant relationship in this case.

In *Patel Pravin Kumar Somnath & others* v. *Gujarat State Land Development Corpn. Ltd. & others*,[2] under the contract of Apprenticeship the petitioners were engaged as mere trainees for a period of one year and the Corporation was not bound to employ them in their work after the training period was over. It was held that such Apprentices cannot be said to be employed in connection with the work of the Corporation more so when they were not given wages but only stipend. The relationship between the Corporation and the Apprentice is not that of master and servant, on the other hand it is a contract of Apprenticeship pure and simple under which Apprentices were to be given training for a specified period.

Section 19. Records and returns.—(1) Every employer shall maintain records of the progress of training of each apprentice undergoing apprenticeship training in his establishment, in such form as may be prescribed.

(2) Every such employer shall also furnish such information and returns in such form, to such authorities and at such intervals as may be prescribed.

1. (1994) 2 LLJ 1186 (All).
2. (1993) 1 LLJ 916 (Guj).

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Section 20. Settlement of disputes.—(1) Any disagreement or dispute between an employer and an apprentice arising out of the contract of apprenticeship shall be referred to be Apprenticeship Adviser for decision.

(2) Any person aggrieved by the decision of the Apprenticeship Adviser under sub-section (1) may, within thirty days from the date of communication to him of such decision prefer an appeal against the decision to the Apprenticeship Council and such appeal shall be heard and determined by a Committee of that Council appointed for the purpose.

(3) The decision of the Committee under sub-section (2) and subject only to such decision, the decision of the Apprenticeship Adviser under sub-section (1) shall be final.

Section 21. Holding of test and grant of certificate and conclusion of training.—(1) Every trade apprentice who has completed the period of training shall appear for a test to be conducted by the National Council to determine his proficiency in the designated trade in which he has served or undergone his apprenticeship training.

(2) Every trade apprentice who passes the test referred to in sub-section (1) shall be granted a certificate of proficiency in the trade by the National Council.

(3) The progress in apprenticeship training of every graduate or technician apprentice or technician (vocational) apprentice shall be assessed by the employer from time to time.

(4) Every graduate or technician apprentice or technician (vocational) apprentice, who completes his apprenticeship training to the satisfaction of the concerned Regional Board, shall be granted a certificate of proficiency by that Board.

Section 22. Offer and acceptance of employment.—(1) It shall not be obligatory on the part of the employer to offer any employment to any apprentice who has completed the period of his apprenticeship training in his establishment, or shall not be obligatory on the part of the apprentice to accept an employment under the employer.

(2) Notwithstanding anything in sub-section (1), where there is condition in a contract of apprenticeship that the apprentice shall, after the successful completion of the apprenticeship training, serve the employer, the employer shall, on such completion, be bound to offer suitable employment to the apprentice, and the apprentice shall be bound to serve the employer in that capacity for such period and on such remuneration as may be specified in the contract :

Provided that where such period or remuneration is not, in the opinion of the Apprenticeship Adviser, reasonable, he may revise such period or remuneration so as to make it reasonable, and the period or remuneration so revised shall or deemed to be the period or remuneration agreed to between the apprentice and the employer.

In *Narendra Kumar and others* v. *State of Punjab and others*,[1] certain diploma holders in Electrical Engineering Course were appointed as apprentices in the Technical Training Institute, Punjab State Electricity Board and to obtain certificates for having completed successfully the Apprenticeship Training. The contract of Apprenticeship provided that on successful completion of Training the Apprentice shall be absorbed in the Department if there are vacancies. Government of India issued instructions requesting *inter-alia* the Punjab Electricity Board that trained apprentices are absorbed in Industries upto a minimum of 50% of the direct requirement vacancies. A writ petition was filed by an apprentice challenging the advertisements issued by the Board on the ground that they are entitled to be appointed up to 50% of the posts which are advertised. On these facts it was held by the Supreme Court that in spite of the provisions contained in sub-section (1) of Section 22 the employer is obliged to offer suitable employment to an apprentice if the contract of apprenticeship contains a

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1. (1985) 1 LLJ 337 (SC).

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provision that the apprentice shall serve the employer after successful completion of the training. When such an offer is made the apprentice is bound to serve the employer. When the contract of apprenticeship is not happily worded in regard to absorption after successful completion of training, it is not proper to indulge in hairsplitting approach and try to affect the right of the employees, when the contract states "that the apprentice shall be absorbed". It creates reciprocal rights and obligations on the employee and the employer. It binds the employer to offer employment to the apprentice if there is a vacancy and it binds the apprentice to accept offer. The object of the provision is to guarantee to the extent of existence of vacancy that the apprentice will not be rendered jobless.

Offering employment to the apprentice to the extent of 50% of the posts will not violate the law in regard to reservation of post, because the entitlement to appointment is not because of any reservation in favour of apprentices but because of Section 22(2) of the Apprentices Act and the contractual obligation arising out of the contract of apprentice.

In *U.P. State Road Transport Corporation & Another* v. *U.P. Parivahan Nigam Shiskhukhs Berozgar Sangh & others*,[1] the following principles were laid down regarding claim of apprentices to get employment after successful completion of their training :—

(1) Other things being equal, a trained apprentice should be given preference over direct recruits.

(2) For this, a trainee would not be required to get his name sponsored by any employment exchange.[2]

(3) If age bar would come in the way of the trainee, the same would be relaxed in accordance with what is stated in this regard, if any, in the service rule concerned. If the service rule be silent on this aspect, relaxation to the extent of the period for which the apprentice had undergone training would be given.

(4) The training institute concerned would maintain a list of the persons trained yearwise. The persons trained earlier would be treated as senior to the persons trained later. In between the trained apprentices, preference shall be given to those who are senior.

It was held in *N. Krishnamurthy* v. *Executive Director, BHEL Trichy & others*[3] that on completion of training as apprentice it would not be obligatory for either the trainee or the employer to accept or offer any employment unless there was an agreement to that effect. Therefore in the absence of an agreement an apprentice cannot claim that he should be provided with employment.

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1. (1995) 2 LLJ 854 (SC).
2. *Union of India* v. *N. Hariram*, (1987) 1 LLJ 548 (SC).
3. (1993) 2 LLJ 1084 (Madras).

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CHAPTER III
AUTHORITIES

Section 23. Authorities.—(1) In addition to the Government, there shall be the following authorities under this Act, namely :

(a) The National Council,
(b) The Central Apprenticeship Council,
(c) The State Council,
(d) The State Apprenticeship Council,
(e) The All India Council,
(f) The Regional Boards,
(g) The Board of State Councils of Technical Education,
(h) The Central Apprenticeship Adviser, and
(i) The State Apprenticeship Adviser.

(2) Every State Council shall be affiliated to the National Council and every State Apprenticeship Council shall be affiliated to the Central Apprenticeship Council.

(2-A) Every Board or State Council of Technical Education and every Regional Board shall be affiliated to the Central Apprenticeship Council.

(3) Each of the authorities specified in sub-section (1) shall, in relation to apprenticeship training under this Act, perform such functions as are assigned to it by or under this Act or by the Government :

Provided that State Council shall also perform such functions as are assigned to it by the National Council and the State Apprenticeship Council shall also perform such function as are assigned to it by the Central Apprenticeship Council and the Board or State Council of Technical Education.

Section 24. Constitution of Councils.—(1) The Central Government shall, by notification in the Official Gazette, establish the Central Apprenticeship Council and the State Government shall, by notification in the Official Gazette, establish the State Apprenticeship Council.

(2) The Central Apprenticeship Council shall consist of a Chairman and vice-Chairman and such number of other members as the Central Government may think expedient, to be appointed by that Government by notification in the Official Gazette from among the following categories of persons, namely :

(a) representatives of employers in establishments in the public and private sectors,
(b) representatives of the Central Government and of the State Governments,
(c) persons having special knowledge and experience of matters relating to industry, labour and technical education,
(d) representative of the All India Council and of the Regional Boards.

(3) The number of persons to be appointed as members of the Central Apprenticeship Council from each of the categories specified in sub-section (2), the term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling vacancies among, the members of the Council shall be such as may be prescribed.

(4) The State Apprenticeship Council shall, consist of a Chairman and

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Vice-Chairman and such number of other members as the State Government may think expedient, to be appointed by that Government by notification in the Official Gazette from among the following categories of persons namely :

(a) representatives of employers in establishments in the public and private sectors,

(b) representatives of the Central Government and of the State Governments,

(c) persons having special knowledge and experience of matters relating to industry, labour and technical education,

(d) representatives of the Board or of the State Council of Technical Education.

(5) The number of persons to be appointed as members of the State Apprenticeship Council from each of the categories specified in sub-section (4), the term of office of, the procedure to be followed in the discharge of their functions by and the manner of filling vacancies among, the members of the Council shall be such as the State Government may, by notification in the Official Gazette, determine.

(6) The fees and allowances, if any, to be paid to the Chairman and Vice-Chairman and the other members of the Central Apprenticeship Council shall be such as may be determined by the Central Government and the fees and allowances, if any, to be paid to the Chairman and Vice-Chairman and the other members of the State Apprenticeship Council shall be such as may be determined by the State Government.

Section 25. Vacancies not to invalidate acts and proceedings.—No act done or proceeding taken by the National Council, the Central Apprenticeship Council, the State Council, or the State Apprenticeship Council under this Act shall be questioned on the ground merely of the existence of any vacancy in, or defect in the construction of such Council.

Section 26. Apprenticeship Adviser.—(1) The Central Government shall, by notification in the Official Gazette, appoint a suitable person as the Central Apprenticeship Adviser.

(2) The State Government shall, by notification in the Official Gazette, appoint a suitable person as the State Apprenticeship Adviser.

(3) The Central Apprenticeship Adviser shall be the Secretary to the Central Apprenticeship Council and the State Apprenticeship Adviser shall be the Secretary to the State Apprenticeship Council.

Section 27. Deputy and Assistant Apprenticeship Advisers.—(1) The Government may appoint suitable persons as Additional, Joint, Regional, Deputy and Assistant Apprenticeship Advisers to assist the Apprenticeship Adviser in the performance of his functions.

(2) Every Deputy or Assistant Apprenticeship Adviser shall, subject to the control of the Apprenticeship Adviser, perform such functions as may be assigned to him by the Apprenticeship Adviser.

Section 28. Apprenticeship Advisers to be public servants.—Every Apprenticeship Adviser and every Additional, Joint, Regional, Deputy or Assistant Apprenticeship Adviser appointed under this Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code, 1860.

Section 29. Powers of entry, inspection, etc.—(1) Subject to any rules made in this behalf, the Central Apprenticeship Adviser or such other person not below the rank of an Assistant Apprenticeship Adviser, as may be authorised by the Central Apprenticeship Adviser in writing in this behalf may—

(a) with such assistants, as he thinks fit, enter, inspect and examine any establishment or part thereof at any reasonable time ;

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(b) examine any apprentice employed therein or require the production of any

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register, record or other documents maintained in pursuance of this Act and take on the spot or otherwise statement of any person which he may consider necessary for carrying out the purposes of this Act ;

(c) make such examination and inquiry as he thinks fit in order to ascertain whether the provisions of this Act and the rules made thereunder are being observed in the establishment ;

(d) exercise such other powers as may be prescribed :

Provided that a State Apprenticeship Adviser or such other person, not below the rank of an Assistant Apprenticeship Adviser, as may be authorised by the State Apprenticeship Adviser in writing in this behalf, may also exercise any of the powers specified in clauses (a), (b) (c) or (d) of this sub-section in relation to establishments for which the appropriate Government is the State Government.

(2) Notwithstanding anything in sub-section (1), no person shall be compelled under this section to answer any question or make any statement which may tend directly or indirectly to incriminate him.

Section 30. Offences and penalties.—(1) If any employer—

(a) engages as an apprentice a person who is not qualified for being so engaged, or

(b) fails to carry out the terms and conditions of a contract of apprenticeship, or

(c) contravenes the provisions of this Act relating to the number of apprentices which he is required to engage under those provisions,

he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) If any employer or any others person—

(a) required to furnish any information or return—

(i) refuses or neglects to furnish such information or return, or

(ii) furnishes or causes to be furnished any information or return, which is false which he either knows or believes to be false or does not believe to be true, or

(iii) refuses to answer, or gives a false answer to any question necessary for obtaining any information required to be furnished by him, or

(b) refuses or wilfully neglects to afford the Central or the State Apprenticeship Adviser or such other person, not below the rank of an Assistant Apprenticeship Adviser, as may be authorised by the Central or the State Apprenticeship Adviser in writing in this behalf any reasonable facility for making any entry, inspection, examination or inquiry authorised by or under this Act, or

(c) requires an apprentice to work overtime without the approval of the Apprenticeship Adviser, or

(d) employs an apprentice on any work which is not connected with his training, or

(e) makes payment to an apprentice on the basis of piecework, or

(f) requires an apprentice to take part in any output bonus or incentive scheme,

he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

Section 31. Penalty where no specific penalty is provided.—If any employer or any other person contravenes any provisions of this Act for which no punishment is provided in Section 30, he shall be punishable with fine which shall not be less than one thousand rupees but may extend to three thousand rupees.

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Section 32. Offences by companies.—(1) If the person committing an offence

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under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to such punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary, or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) "company" means a body corporate and includes a firm or other association of individuals ; and

(b) "director" in relation to a firm means a partner in the firm.

Section 33. Cognizance of offences.—No court shall take cognizance of any offence under this Act or the rules made thereunder except on a complaint thereof in writing made by the Apprenticeship Adviser or the officer of the rank of Deputy Apprenticeship Adviser and above within six months from the date on which the offence is alleged to have been committed.

Section 34. Delegation of powers.—The appropriate Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act or the rules made thereunder shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction be exercisable also—

(a) where the appropriate Government is the Central Government, by such officer or authority subordinate to the Central Government or by the State Government or by such officer or authority subordinate to the State Government, as may be specified in the notification ; and

(b) where the appropriate Government is the State Government, by such officer or authority subordinate to the State Government as may be specified in the notification.

Section 35. Construction of references.—(1) Any reference in this Act or in the rules made thereunder to the Apprenticeship Council shall, unless the context otherwise requires, means in relation to apprenticeship training in a designated trade in an establishment in relation to which the Central Government is the appropriate Government, the Central Apprenticeship Council ; and in relation to apprenticeship training in a designated trade in an establishment in relation to which the State Government is the appropriate Government, the State Apprenticeship Council.

(2) Any reference in this Act or in the rules made thereunder to the Apprenticeship Adsiver shall, unless the context otherwise requires—

(a) mean in relation to apprenticeship training in a designated trade in an establishment in relation to which the Central Government is the Appropriate Government, the Central Apprenticeship Adviser, and in relation to apprenticeship training in a designated trade in an establishment in relation to which the State Government is the appropriate Government, the State Apprenticeship Adviser

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(b) be deemed to include an Additional, a Joint, a Regional, a Deputy or an

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Assistant Apprenticeship Adviser performing the functions of the Apprenticeship Adviser assigned to him under sub-section (2) of Section 27.

Section 36. Protection of action taken in good faith.—No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Section 37. Power to make rules.—(1) The Central Government may, after consulting the Central Apprenticeship Council, by notification in the Official Gazette, make rules for carrying out the purpose of this Act.

(2) Rules made under this Act may provide that a contravention of any such rule shall be punishable with fine which may extend to fifty rupees.

(3) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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THE COLLECTION OF STATISTICS ACT, 1953

Object and Scope.—Before passing of this Act, it was felt that the Government had very limited legal powers to collect statistics for the various subjects which were the concern of the Centre, particularly in the industrial and commercial field.

It was also considered that the existing arrangements for getting trade statistics through the customs authorities and statistical data in respect of specific commodities under the relevant Acts, were also not very comprehensive. Accordingly Government had largely to depend on voluntary co-operation of the interests concerned in regard to the collection of statistical data from industrial concerns and business houses. Before passing of the Act foreign owned and controlled firms were asked to furnish statistics about the extent to which Indian and foreign nationals were engaged by them. But the response has not been very satisfactory. Therefore it was thought expedient to arm the Government with powers to compel all concerns including Managing Agency Firms engaged in (a) trade and commerce with foreign countries, (b) inter-State trade and commerce, (c) trading firms or corporations incorporated, registered or otherwise permitted in India, including banking, insurance and other financial corporations and (d) stock exchanges, to furnish such information. With these ends in view the Collection of Statistics Act was passed in the year 1953. It replaces the Industrial Statistics Act, 1942. It incorporates all the existing provisions of the repealed Act and provides, in addition, for the collection of information and statistics in respect of matters related to Items 41, 42, 43 and 48 in List I in the Seventh Schedule to the Constitution. This Act extends to the whole of India except the State of Jammu and Kashmir. The Act though enacted in 1953, came in force on November 10, 1956. It has also been extended to the Union territory of Goa, Daman and Diu and Pondicherry.

Section 2. Definitions.—In this Act, unless the context otherwise requires,—

(a) **"appropriate Government"** means—

(i) the Central Government, in relation to the collection of statistics under a direction issued by it under Section 3, and

(ii) the State Government, in relation to the collection of statistics under a direction issued by it under the section.

(b) **"commercial concern"** means a public limited company or a co-operative society or a firm or any other person or body of persons engaged in trade or commerce, and includes—

(i) a concern engaged in banking or insurance ;

(ii) a financial corporation ;

(iii) a concern engaged in shipping and navigation ;

(iv) a concern engaged in the business of brokers dealing in shares, stocks and securities and commodities ;

(v) a concern engaged in the business of advertising consultations ;

(vi) a light railway ;

(vii) a concern engaged in road transport service ;

(viii) a concern engaged in air transport service ;

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(ix) a rubber, tea, coffee or cinchona plantation ;

(x) a concern engaged in the business of forwarding and clearing agents ;

(xi) any other concern which, in the opinion of the Central Government, is a commercial concern and is declared to be such by the Government by notification in the Official Gazette, but does not include an industrial concern.

(c) **"factory"** means a factory as defined in clause (m) of Section 2 of the Factories Act, 1948.

(d) **"industrial concern"** means a public limited company or co-operative society or a firm or any other person or body of persons engaged in the manufacture, assembling, packing, preservation or processing of goods or in mining or in the generation or distribution of electricity or any other form of power.

(e) **"owner"** in relation to commercial or an industrial concern means the person who, or the authority which, has the ultimate control over the affairs of the concern, and where the said affairs are entrusted to a manager, managing director or managing agent, such manager, managing director or managing agent shall be deemed to be the owner of the concern.

(f) **"prescribed"** means prescribed by rules made under this Act or in any form laid down by such rules.

Section 3. Collection of Statistics.—The appropriate Government may, by notification in the Official Gazette, direct that statistics shall be collected relating to any of the following matters, namely :—

(a) any matter relating to any industry or class of industries ;

(b) any matter relating to any commercial or industrial concern or class of commercial concerns, and in particular, any matter relating to factories ;

(c) any of the following matters so far as they relate to welfare of labour and conditions of labour, namely :—

(i) price of commodities ;

(ii) attendance ;

(iii) living conditions including housing, water supply and sanitation ;

(iv) indebtedness ;

(v) rents of dwelling houses ;

(vi) wages and other earnings ;

(vii) provident and other funds provided for labour ;

(viii) benefits and amenities provided for labour ;

(ix) hours of work ;

(x) employment and unemployment ;

(xi) industrial and labour disputes ;

(xii) labour turnover ;

(xiii) trade unions ;

and thereupon the provisions of this Act shall apply in relation to those statistics :

Provided that—

(a) nothing contained in this section shall be deemed to authorise a State Government to issue any direction under this Act with respect of the collection of statistics relating to any matter falling under any of the entries specified in List I in the Seventh Schedule to the Constitution ; or

(b) where the Central Government has issued any direction under this section for the collection of statistics relating to any matter, no State Government

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shall, except with the previous approval of the Central Government, issue any similar direction for so long as the collection of statistics by the Central Government remains to be completed ; or

(c) where a State Government has issued a direction under this section for the collection of statistics relating to any matter, the Central Government shall not issue any similar direction for so long as the collection of statistics by the State Government remains to be completed, except in cases where statistics have to be collected with reference to two or more States.

Section 4. Appointment of statistics authority.—The appropriate Government may appoint an officer to be the statistics authority for the purpose of collecting any statistics to be collected directly by it.

Chief Director, National Sample Survey, has been appointed as Statistical Authority in pursuance of power conferred by this section.

Section 5. Power of statistics authority to call for information or returns.—(1) The statistics authority may serve or cause to be served on the owner of an industrial or commercial concern or on any other person a notice requiring him to furnish such information on returns as may be prescribed relating to any matter in respect of which statistics are to be collected.

(2) The form in which, and the person to whom, or the authorities to which, such information or returns should be furnished, the particulars which they should contain and the intervals within which such information or returns should be furnished shall be such as may be prescribed.

(3) The notice referred to in sub-section (1) may be served by post.

Section 6. Right of access to records or documents.—The statistics authority or any person authorised by him in writing in this behalf shall, for the purpose of the collection of any statistics under this Act, have access to any relevant record or document in the possession of any person required to furnish any information or return under this Act and may enter at any reasonable time any premises where he believes such record or document to be and may inspect or take copies of relevant records or documents or ask any question for obtaining any information required to be furnished under this Act.

Section 7. Restrictions on the publication of information and returns.—(1) No information, no individual return and no part of an individual return with respect to any particular industrial or commercial concern, given for the purposes of this Act shall, without the previous consent of the person in relation to which the information or return was given or made or his authorized agent, be published in such manner as would enable any particulars to be identified as referring to a particular concern.

(2) Except for the purposes of a prosecution under this Act or under the Indian Penal Code, no person who is not engaged in the collection of statistics under this Act shall be permitted to see any information or individual return referred to in sub-section (1).

Section 8. Penalties.—If any person—

(a) required to furnish any information or return—

(i) wilfully refuses or without lawful excuse neglects to furnish such information or return as may be required under this Act ; or

(ii) wilfully refuses or causes to be furnished any information or return which he knows to be false ; or

(iii) refuses to answer or wilfully gives a false answer to any question necessary for obtaining any information required to be furnished under this Act ; or

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(b) impedes the right of access to relevant records, documents or the right of entry conferred by Section 6 ;

he shall for each such offence by punishable with fine which may extend to five hundred rupees and in the case of a continuing offence to a further fine which may extend to two hundred rupees for each day after the first during which the offence continues.

Section 9. Offences by companies.—(1) If the person guilty of an offence under Section 8 is a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(a) "company" means any body corporate and includes a firm or other association of individuals ; and

(b) "director" in relation to a firm means a partner in the firm.

Section 10. Penalty for improper disclosure of information or return.—If any person engaged in connection with the collection of statistics under this Act wilfully discloses any information or the contents of any return given or made under this Act otherwise than in the execution of his duties under this Act or the purposes of the prosecution of an offence under this Act or under the Indian Penal Code, he shall be punishable for such offence with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Section 11. Cognizance of offences.—No prosecution for an offence under Section 8 shall be instituted except by or with the sanction of the statistics authority and no prosecution for an offence under Section 10 shall be instituted except by or with the consent of the appropriate Government.

Section 12. Power of Central Government to give directions.—The Central Government may give directions to a State Government as to the carrying into execution of this Act in the State.

Section 13. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against the appropriate Government, the statistics authority or any other person acting under the authority of the appropriate Government or of the statistics authority in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or directions issued thereunder.

Section 14. Power to make rules.—(1) The appropriate Government may, subject to the condition of previous publication, by notification in the Official Gazette, make rules for the purpose of carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, rules may be made under this section for all or any of the following matters, namely :—

(a) the form and manner in which the information and return may be furnished,

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the particulars which they should contain, the intervals within which and the authority to which such information and returns may be furnished ;

(b) the manner in which the right of access to documents and the right of entry conferred by Section 6 may be exercised ; or

(c) any other matter which is to be or may be prescribed under this Act.

(3) Every rule made by the Central Government under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(4) Every rule made by the State Government under this section shall be laid, as soon as it is made, before the State Legislature.

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THE MATERNITY BENEFIT ACT, 1961

Section 1. Extent and Commencement.—The Maternity Benefit Act, 1961 was enacted to regulate the employment of women in certain establishments for certain periods before and after child birth and to provide for maternity benefit and certain other benefits. This Act extends to the whole of India except the State of Jammu and Kashmir. It shall come into force on such date as may be notified in this behalf in the Official Gazette, (a) in relation to mines and to any other establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performance, by the Central Government and (b) in relation to other establishments in a state by the State Government.

The Maternity Benefit Act is intended to achieve the object of doing social justice to women workers. Therefore in interpreting the provisions of this Act beneficient rule of construction, which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output, has to be adopted by the Court.[1]

Section 2. Application.—It applies in the first instance—

(a) to every establishment which is a factory, mine or plantation, including any such establishment belonging to Government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances,

(b) to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a state, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

Save as otherwise provided in Sections 5-A and 5-B nothing contained in this Act shall apply to any factory or other establishment to which the provisions of Employees' State Insurance Act, 1948 apply. Proviso to Section 2(1) empowers the State Government to extend all or any of the provisions of this Act to any other establishment or class of establishments whether the establishments are industrial, commercial, agricultural or otherwise. The State Government can do so after giving two months notice by notification in the Official Gazette of its intention to do so and shall also take the approval of the Central Government.

Section 3. Definitions.—In this Act, unless the context otherwise requires,—

(a) **Appropriate Government.**—In relation to an employment being a mine, or an establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performances the appropriate Government means Central Government and in relation to any other establishment, the State Government.

(b) **Child.**—'Child' includes a still born child.

(c) **Delivery.**—'Delivery' means the birth of a child.

(d) **Employer.**—'Employer' means :—

(i) in relation to an establishment which is under the control of the

1. *B. Shah* v. *Labour Court, Coimbatore*, AIR 1978 SC 12.

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Government, a person or authority appointed by the Government for the supervision and control of employees or where no person or authority is so appointed the head of the department ;

(ii) in relation to an establishment under any local authority, the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the chief executive officer of the local authority ;

(iii) in any other case, the person who or the authority which has the ultimate control over the affairs of the establishment and where the said affairs are entrusted to any other person whether called a manager, managing director, managing agent, or by any other name, such person.

(e) **Establishment.**—'Establishment' means a factory, a mine, a plantation, or an establishment to which the provisions of this Act have been declared under Section 2(1) to be applicable.

(f) **Factory.**—'Factory' means a factory as defined in Section 2(m) of the Factories Act, 1948.

(g) **Inspector.**—'Inspector' means an Inspector appointed under Section 14 of this Act.

(h) **Maternity benefit.**—'Maternity benefit' means the payment referred to in Section 5(1) of the Act.

(ha) **Medical termination of pregnancy.**—'Medical termination of pregnancy' means the termination of pregnancy permissible under the provisions of the Medical Termination of Pregnancy Act, 1971.

(i) **Mine.**—'Mine' means a mine as defined in Section 2(j) of the Mines Act, 1952.

(j) **Miscarriage.**—'Miscarriage' means expulsion of the contents of a pregnant uterus at any period prior to or during the twenty-sixth week of pregnancy but does not include any miscarriage, the causing of which is punishable under the Indian Penal Code.

(k) **Plantation.**—'Plantation' means a plantation as defined in Section 2(f) of the Plantation Labour Act, 1951.

(l) **Prescribed.**—'Prescribed' means prescribed by rules made under this Act.

(m) **State Government.**—In relation to a Union Territory, State Government means the Administrator thereof.

(n) **Wages.**—'Wages' means all remuneration paid or payable in cash to a workman, if the terms of the contract of employment, express or implied were fulfilled. Wages include—

(1) such cash allowances (including dearness allowance and house-rent allowance) as a workman is for the time being entitled to ;

(2) incentive bonus ; and

(3) the money value of the concessional supply of food-grains and other articles,

But wages do not include—

(i) any bonus other than incentive bonus ;

(ii) overtime earnings and any deduction or payment made on account of fines ;

(iii) any contribution paid or payable by the employer to any pension fund, or provident fund or for the benefit of the woman under any law for

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the time being in force ; and

(iv) any gratuity payable on the termination of service.

(o) **Woman.**—'Woman' means a woman employed, whether directly or through any agency, for wages in any establishment.

Section 4. Employment of, or work by woman prohibited during certain period.—Under Section 4 of the Act, the employer is prohibited from knowingly employing any woman in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.

No woman shall work in any establishment during the six weeks immediately following the day of her delivery, miscarriage or medical termination of pregnancy.

Without prejudice to the provisions of Section 6 no pregnant woman shall, on a request being made by her, be required by her employer to do any work of the following nature during the period of one month immediately preceding the period of six weeks before the date of her expected delivery and during the said period of six weeks for which the pregnant woman does not avail of the leave of absence under Section 6 :

(1) any work which is of arduous nature ;

(2) any work which involves long hours of standing ;

(3) any work which in any way is likely to interfere with her pregnancy or the normal development of foetus or likely to cause her miscarriage or otherwise adversely affect her health.

In *Tata Tea Ltd.* v. *Inspector of Plantations*,[1] the question for consideration was whether an employee entitled to the benefit of Maternity Benefit Act, 1961 is eligible to claim the benefit under Section 5(1) of the Kerala Industrial Establishments (National and Festival Holidays) Act, 1958. Under Section 4-A of the National and Festival Holidays Act an employer could require any employee to work on any such holidays and any such employee was under Section 5(2) entitled to twice the wages for working on that day. Under Section 4 of the Maternity Benefit Act an employee is entitled to certain benefits including maternity leave during the period mentioned in that section. It was held that during the period mentioned in sub-sections (1) and (2) of Section 4 of the Maternity Benefit Act, the employer cannot in exercise of his right under Section 4-A of the National and Festival Holidays Act call upon a woman employee to come and do the work on the national and festival holidays allowed under Section 3 of the said Act. The said right of the employer, as regards the period made mention of in Section 4 of the Maternity Benefit Act however is subject to the restrictions imposed by sub-section (3) thereof. Considered in this background the claim of the employees for the wages under the National and Festival Holidays Act is not sustainable.

Section 5. Right to payment of maternity benefit.—Section 5 provides that the maternity benefit to which every woman shall be entitled and her employer shall be liable for, is a payment to a worker at the rate of average daily wages for the period of her actual absence immediately preceding and including the day of her delivery and for six weeks immediately following that day.

For the purposes of paying the maternity benefit to a woman worker as stated above, the average daily wages means the average of the woman's wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, or one rupee a day, whichever is higher.

Section 5(2) provides that no woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit for a period of not less than one hundred and sixty days in the twelve

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1. (1992) 1 Lab LJ 603 (Kerala).

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months immediately preceding the date of her expected delivery. The qualifying period of one hundred and sixty days as aforesaid shall not apply to a woman who has immigrated into the State of Assam and was pregnant at the time of immigration.

For the purposes of calculating the days on which a woman has actually worked in the establishment, the days for which she has been laid off during the period of twelve months immediately preceding the date of her expected delivery, shall be taken into account.

Section 5(3) provides that a woman shall be entitled to maternity benefit for a minimum period of twelve weeks, that is six weeks upto and including the day of her delivery and six weeks immediately following that day :

Provided that where a woman dies during this period, the maternity benefits shall be payable only for the days upto and including the day of her death. Where a woman having been delivered of child, dies during her delivery or during the period of six weeks immediately following the date of her delivery, leaving behind in either case the child, the employer shall be liable for the maternity benefit for the entire period of six weeks immediately following the day of her delivery but if the child dies during the said period, then, for the days upto and including the day of the death of the child.

A woman worker who expects a child is entitled to maternity benefit for a maximum period of twelve weeks which is split up into two periods *viz.*, pre-natal and post-natal.

In *B. Shah* v. *Labour Court, Coimbatore*,[1] the question was whether Sunday is to be counted in calculating the amount of maternity benefit. It was held that in the context of sub-sections (1) and (3) of Section 5, the terms week has to be taken to signify a cycle of seven days including Sundays. The Legislature intended that computation of maternity benefit is to be made for the entire period of the woman workers' actual absence, *i.e.*, for all the days, including Sundays, which may be wageless holidays falling within that period and not only for intermittent periods of six days thereby excluding Sundays falling within that period. Again the word "period" occurring in Section 5(1) seems to emphasize the continuous running of time and recurrence of the cycle of seven days. This computation ensures that the woman worker gets for the said period not only the amount equalling 100 per cent of the wages which she was previously earning in terms of Section 3(n) of the Act but also the benefit of the wages for all the Sundays and rest days falling within the aforesaid two periods which would ultimately be conducive to the interest of both the woman worker and her employer.[2]

In *Ram Bahadur Thakur (P.) Ltd.* v. *Chief Inspector of Plantations*[3] the point for determination by the Court was whether in calculating 160 days period which will entitle a woman employee to get maternity benefit, the work on half days can be included or not. It was held that according to Explanation to Section 5(2) of the Maternity Benefit Act, the period during which a woman worker was laid off should also be taken into consideration for ascertaining the eligibility. During the lay-off period a woman worker cannot be expected to have actually worked in the establishment. So, actual work for 160 days cannot be insisted as a condition precedent for claiming the maternity benefit.

Section 5-A. Continuance of payment of maternity benefit in certain cases.—Every woman entitled to the payment of maternity benefit under this Act shall notwithstanding the application of the Employees' State Insurance Act, 1948, to the factory or other establishment in which she is employed, continue to be so entitled until

1. AIR 1978 SC 12 ; *Malayalam Plantations* v. *Inspector of Plantations*, AIR 1975 Ker 86 overruled.
2. *Ibid.*
3. (1989) 2 Lab LJ 20 (Kerala).

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she becomes qualified to claim maternity benefit under Section 50 of that Act.

Section 5-B. Payment of maternity benefit in certain cases.—Every woman—

(a). who is employed in a factory or other establishment to which the provisions of the Employees' State Insurance Act, 1948, apply ;

(b) whose wages (including remuneration for over-time work) for a month exceed the amount specified in sub-clause (b) of clause (9) of Section 2 of that Act ; and

(c) who fulfills the conditions specified in sub-section (2) of Section 5, shall be entitled to the payment of maternity benefit under this Act.

Section 6. Notice of claim for maternity benefit and payment thereof.—Section 6 provides that any woman employed in an establishment and entitled to maternity benefit under the provisions of the Act may give notice in writing in such form as may be prescribed, to her employer, stating that her maternity benefit and any other amount to which she may be entitled under this Act may be paid to her or to such person as she may nominate in the notice and that she will not work in any establishment during the period for which she receives maternity benefit.

In the case of a woman who is pregnant such notice shall state the date from which she will be absent from work, not being a date earlier than six weeks from the date of her expected delivery. Any woman who has not given the notice when she was pregnant may give such notice as soon as possible after delivery. On receipt of the notice, the employer shall permit such woman to absent herself from the establishment until the expiry of six weeks after the day of her delivery.

The amount of maternity benefit for the period preceding the date of her expected delivery shall be paid in advance by the employer to the woman on production of such proof as may be prescribed that the woman is pregnant and the amount due for the subsequent period shall be paid by the employer to the woman within forty-eight hours of production of such proof as may be prescribed that the woman has been delivered of a child.

The failure to give notice under this section shall not disentitle a woman to maternity benefit or any other amount under this Act, if she is otherwise entitled to such benefit or amount and in any such case as Inspector may either of his own motion or on an application made to him by the woman, order the payment of such benefit or amount within such period as may be specified in the order.

Section 7. Payment of maternity benefit in case of death of a woman.—If a woman entitled to maternity benefit or any other amount, under this Act, dies before receiving such maternity benefit or amount, or where the employer is liable for maternity benefit under the second proviso to Section 5(3), the employer shall pay such benefit or amount to the person nominated by the woman in the notice given under Section 6 and in case there is no such nominee to her legal representative.

Section 8. Payment of medical bonus.—Every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of twenty-five rupees if no pre-natal confinement and post-natal care is provided for by the employer free of charge.

Section 9. Leave for miscarriage.—In case of miscarriage or medical termination of pregnancy, a woman shall, on production of such proof as may be prescribed, be entitled to leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of her miscarriage or, as the case may be, her medical termination of pregnancy.

Section 9-A. Leave with wages for tubectomy operation.—In case of tubectomy operation, a woman shall, on production of such proof as may be prescribed,

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be entitled to leave with wages at the rate of maternity benefit for a period of two weeks immediately following the day of her tubectomy operation.

Section 10. Other leaves.—A woman suffering from illness arising out of pregnancy, delivery, premature birth of a child, miscarriage, medical termination of pregnancy or tubectomy operation shall, on production of such proof as may be prescribed, be entitled in addition to the period of absence allowed to her under Section 6, or as the case may be, under Section 9 to leave with wages at the rate of maternity benefit for a maximum period of one month.

Section 11. Nursing breaks.—Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for the rest allowed to her, be allowed in the course of the daily work, two breaks of the prescribed duration for nursing until the child attains the age of fifteen months.

Section 12. Dismissal during absence of pregnancy.—When a woman absents herself from work in accordance with the provisions of this Act, it shall be unlawful for her employer to discharge or dismiss her during or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service.

The discharge or dismissal of a woman at any time during her pregnancy if the woman but for such discharge or dismissal would have been entitled to maternity benefit or medical bonus referred to in Section 8, shall not have the effect of depriving her of the maternity benefit or medical bonus :

Provided that where the dismissal is for any prescribed gross misconduct, the employer may, by order in writing communicated to the woman, deprive her of the maternity benefit or medical bonus or both.

Any woman deprived of maternity benefit or medical bonus or both, may within sixty days from the date on which the order of such deprivation is communicated to her, appeal to such authority as may be prescribed, and the decision of that authority on such appeal, whether the woman should or should not be deprived of maternity benefit or medical bonus or both, shall be final.

The provisions of Section 12(2) shall not affect the provisions of Section 12(1).

Section 13. Deduction of wages.—Any deduction from the normal and usual daily wages of a woman entitled to maternity benefit under the provisions of this Act shall not be made by reason only of—

(a) the nature of work assigned to her by virtue of the provisions contained in Section 4(3) ; or

(b) breaks for nursing the child allowed to her under the provisions of Section 11.

Section 14. Appointment of Inspectors.—The appropriate Government may, by notification in the Official Gazette appoint such officers as it thinks fit to be inspectors for the purposes of this Act and may define the local limits of the jurisdiction within which they shall exercise their function under this Act.

Section 15. Powers and duties of Inspectors.—Section 15 confers the following powers upon an Inspector. The exercise of any such power by the Inspector is subject to the prescribed restrictions or conditions :

(1) An Inspector may enter at all reasonable time with such assistants, if any, being persons in the service of the Government of any local or other public authority ; as he thinks fit, any premises or place where women are employed or work is given to them in an establishment for the purposes of examining any registers, records and notices required to be kept or exhibited by or under this Act and require production for inspection.

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(2) He may examine any person whom he finds in any premises or place and who, he has reason to believe, is employed in the establishment. But he cannot compel any person to answer any question or give any evidence tending to incriminate himself.

(3) He may require the employer to give information regarding the names and addresses of women employed, payments made to them and application or notices received from them under this Act.

(4) He may take copies of any registers and records or notices or any portion thereof.

Section 16. Inspectors to be public servants.—Every inspector appointed under this Act shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.

Section 17. Power of Inspector.—An Inspector can direct certain payment to be made to a woman under this Act. Any woman claiming that maternity benefit or any other amount to which she is entitled under this Act and any person claiming that payment due under Section 7 has been improperly withheld may make a complaint to the Inspector. Sub-section (2) provides that the Inspector may of his own motion or on receipt of a complaint make an enquiry or cause an enquiry to be made and if satisfied that payment has been wrongfully withheld, may direct the payment to be made in accordance with his orders.

Any person aggrieved by the decisions of the Inspector may appeal to the prescribed authority. The appeal shall be preferred within thirty days from the date on which the decision of the Inspector is communicated to such person. The decision of the appellate authority shall be final. Where no appeal from the decision of the Inspector is made, his decision shall be final. Any amount payable in pursuance of the decision of the Inspector or of the appellate authority under Section 17 shall be recoverable as an arrear of land revenue.

Section 18. Forfeiture of maternity benefit.—If a woman works in any establishment, after she has been permitted by her employer to absent herself under the provisions of Section 6, for any period during such authorised absence, she shall forfeit her claim to the maternity benefit for such period.

Section 19. Abstract of Act and rules to be exhibited.—Section 19 requires that an abstract of the provisions of this Act and the rules made thereunder in the language or languages of the locality shall be exhibited in a conspicuous place by the employer in every part of the establishment in which women are employed.

Section 20. Registers.—Every employer shall prepare and maintain such registers, records, and muster rolls in such manner as may be prescribed.

Section 21. Penalty for contravention of Act by employer.—Section 21 provides that if any employer contravenes the provisions of this Act or the rules made thereunder, he shall be punishable with imprisonment which may extend to three months or with fine which may extend to five hundred rupees, or with both. Where the employer contravenes any provision regarding maternity benefit or regarding payment of any other amount and such maternity benefit or amount has not already been recovered, the court shall, in addition recover such maternity benefit or amount as if it were a fine and pay the same to the person entitled thereto.

Section 22. Penalty for obstructing Inspector.—The following acts shall be punishable with imprisonment which may extend to three months, or with fine which may extend to five hundred rupees, or with both :

(i) failure to produce on demand by the Inspector any register or document kept in custody of the person in pursuance of this Act or the rules made

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thereunder ; and

(ii) concealing or preventing any person from appearing before or being examined by an Inspector.

Section 23. Cognizance of offences.—Section 23 prohibits any prosecution for an offence punishable under this Act or any rule made thereunder to be made after the expiry of one year from the date on which the offence is alleged to have been committed. No prosecution shall be made except by or with the previous sanction of the Inspector. In computing the period of one year as aforesaid, the time, if any, taken for the purpose of obtaining such previous sanction shall be included. Further no court inferior to that of a Presidency Magistrate or a Magistrate of the First class shall try such offence.

Section 24. Prohibition of action taken in good faith.—Section 25 provides that any suit, prosecution or other legal proceeding shall not lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.

Section 25. Power of Central Government to give directions.—The Central Government may give such directions as it may deem necessary to a State Government regarding the carrying into execution of the provisions of this Act and the State Government shall comply with such directions.

Section 26. Power to exempt establishments.—If the appropriate Government is satisfied that having regard to an establishment or a class of establishments providing for grant of benefits which are not less favourable than those provided in this Act, it is necessary so to do, it may, by notification in the Official Gazette, exempt, subject to such conditions and restrictions, if any, as may be specified in the notification, the establishment or class of establishments from the operation of all or any of the provisions of this Act or any rule made thereunder.

Section 27. Effect of laws and agreements inconsistent with this Act.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the coming into force of this Act. The above provision is subject to the exception that where under any such award, agreement, contract of service or otherwise, a woman is entitled to benefit in respect of any matter which are more favourable to her than those to which she would be entitled under this Act, the woman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that she is entitled to receive benefits in respect of the matters under this Act.

Section 27(2) provides that nothing contained in this Act shall be construed to preclude a woman from entering into an agreement with her employer for granting her rights or privileges in respect of any matter which are more favourable to her than those to which she would be entitled under this Act.

Section 28. Power to make rules.—(1) The appropriate Government may, subject to the condition of previous publication and by notification in the Official *Gazette*, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for--

(a) the preparation and maintenance of registers, records and muster rolls ;

(b) the exercise of powers (including the inspection of establishments) and the performance of duties by Inspectors for the purposes of this Act ;

(c) the method of payment of maternity benefit and other benefits under this Act in case no such provision has not been made therefor in this Act ;

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(d) the form of notice under Section 6 ;

(e) the nature of the proof required under the provisions of this Act ;

(f) the duration of nursing breaks referred to in Section 11 ;

(g) acts which may constitute gross misconduct for purposes of Section 12 ;

(h) the authority to which an appeal under clause (b) of sub-section (2) of Section 12 shall lie ; the form and manner in which such appeal may be made and the procedure to be followed in disposal thereof ;

(i) the authority to which an appeal shall lie against the decision of the Inspector under section 17 ; the form and manner in which such appeal may be made and the procedure to be followed in disposal thereof ;

(j) the form and manner in which complaints be made to Inspectors under sub-section (1) of section 17 and the procedure to be followed by them when making inquiries or causing inquiries to be made under sub-section (5) of that section ;

(k) any other matter which is to be, or may be prescribed.

(3) Every rule made by the Central Government under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so however that any such modification or annulment shall be, without prejudice to the validity of anything done previously under that rule.

Section 29. Amendment of Act 69 of 1951.—In Section 32 of the Plantations Labour Act, 1951,—

(a) in sub-section (1), the letter and brackets "(a)" before the words "in the case of sickness", the word "and" after the words "sickness allowance" and "clause (b)" shall be *omitted* ;

(b) in sub-section (2) the words "or maternity" shall be omitted.

Section 30. Repeal.—On the application of this Act—

(i) to mines, the Mines Maternity Benefit Act, 1941 (19 of 1941) ; and

(ii) to factories situate in the Union territory of Delhi, the Bombay Maternity Benefit Act, 1929 (Bom. Act VII of 1929) as in force in that territory, shall stand *repealed.*

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THE PAYMENT OF GRATUITY ACT, 1972

Introduction.—Although the right of industrial workers to receive gratuity has long been recognised by the Tribunals, yet the law relating to payment of gratuity was very vague and uncertain before passing of the present Act. There was a good deal of disparity in the various schemes for the payment of gratuity. The Supreme Court had made efforts to regulate through judicial decisions by laying down principles for grant of gratuity. Still controversies with regard to the rules and principles were continuing. Ultimately all controversies were set at rest by passing of the Payment of Gratuity Act in the year 1972. As the preamble of the Act suggests, this Act aims to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oil fields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. It was pointed out in *Delhi Cloth and General Mills Co. Ltd.* v. *Their Workmen*,[1] that the object of providing a gratuity scheme is to provide a retiring benefit to the workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer.

In *Indian Ex-services League and others* v. *Union of India and others*,[2] writ petitions were filed by some commissioned and non-commissioned ex-servicemen. Gratuity was payable at enhanced rate to persons retiring on a later date. Therefore those who had retired earlier to the specified date also claimed enhancement and payment of gratuity at rates payable to retirees after the specified date on the ground of one rank one pension rule. It was held that the claim for gratuity can be made only on the date of retirement on the basis of salary drawn on the date of retirement and being already paid on that footing, the transaction was completed and closed. It could then not be reopened as a result of enhancement made at a later date for persons retiring subsequently. The concept of gratuity is different from pension. Therefore claim for payment of gratuity at enhanced rate made on the basis of enhancement for persons retiring on a later date cannot be accepted. The conclusion of the court in *D.S. Nakara and others* v. *Union of India*[3] was that the benefits of liberalisation of the pension scheme have to be given equally to all retirees irrespective of their dates of retirement and those benefits cannot be confined only to the persons who retired on or after the specified date because for the purpose of grant of the benefits of liberalisation in pension, all retirees constitute one class irrespective of their date of retirement.

In *Krishna Kumar and others* v. *Union of India & others*,[4] also the Supreme Court held that Provident Fund retirees and pension retirees constitute different classes and it was never held in *Nakara* case that pension retirees and P.F. retirees formed homogeneous class, even though pension retirees alone did constitute a homogeneous class within which any further classification for the purpose of liberalised pension scheme was impermissible.

Thus from these decisions it is clear that the concept of pension, provident fund and gratuity are different from each other.

Scope and application.—The Payment of Gratuity Act, 1972 was passed as Act

1. (1968) 36 FJR 247.
2. (1992) 1 Lab LJ 765 (SC).
3. (1983) 1 Lab LJ 104 (SC).
4. (1991) 1 Lab LJ 191 (SC).

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No. 30 of 1972 and received the assent of the President of India on August 21, 1972. It was enforced with effect from 16th September, 1972. This Act extends to the whole of India. However, in so far as it relates to planatation or ports, it shall not extend to the State of Jammu and Kashmir.

According to sub-section (3) of Section 1, this Act shall apply to—

(a) every factory, mine, oil-field plantation, port and railway company ;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State in which ten or more persons are employed, or were employed, on any day of the preceding twelve months ;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification specify in this behalf.

(3-A) A shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten.

(4) It shall come into force on such date as the Central Government may, by notification appoint. The appointed date for enforcement of the Act is 16 September, 1972.

Thus it is clear from the above provisions that the Act is wide enough to bring within its scope, the entire organised sector of industry and commerce. In relation to its application to shop or establishment, in view of clause (b) of Section 1(3) it applies to every shop or establishment within the meaning of any law for the time being in force. It has been held in *B.N. Sarda (Pvt.) Ltd.* v. *Kishan K. Borade*,[1] that there is no justification whatsoever to qualify the words 'any law' by introducing a qualification that the law should be either a Central law or a State law.

It was held in *Nagar Palika, Moradabad* v. *App. Authority and Addl. Labour Commr. U.P., Kanpur & others*,[2] that Municipal Board is an 'establishment' governed by the Payment of Gratuity Act, 1972. It is not necessary for a legal heir of an employee to first obtain a succession certificate and then apply for payment of gratuity amount. It will depend upon the facts of the case as to whether such certificate would be necessary or not.

In *Municipal Corporation of Delhi* v. *Smt. V.T. Naresh and another*,[3] the question for consideration was whether a local authority created under the Delhi Municipal Corporation Act is an establishment governed by the Payment of Gratuity Act. Relying on the judgment of the Supreme Court in the case of *State of Punjab* v. *The Labour Court of Jullundur and others*,[4] it was held that a corporation and or a local authority like the Municipal Corporation of Delhi is an establishment governed by the Payment of Gratuity Act, 1972. It is an authority created by the Delhi Municipal Corporation Act, 1957. The fact that there is a scheme for payment of gratuity framed by the corporation is no bar to the applicability of the Gratuity Act. Of course an employee cannot have benefits under both the Payment of Gratity Act as well as scheme framed by the corporation.

It was held in *K. Gangadhar & others* v. *The Appellate Authority under Payment of Gratuity Act and others*,[5] that the expression 'law' in Section 1(3)(b) of the Payment

1. 1981 Lab IC 911.
2. (1990) 2 Lab LJ 156 (All).
3. (1986) 1 Lab LJ 323 (Delhi).
4. (1981) 1 Lab LJ 354 (SC).
5. (1993) 1 LLJ 342 (AP).

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of Gratuity Act can means any law in relation to shops, establishments, shops and commercial establishments and also non-commercial establishments. Beedi and Cigar Workers (Conditions of Employment) Act, 1966 is clearly law in relation to establishment as contemplated by Section 1(3)(b) of the Payment of Gratuity Act, 1972 and the Act applies to the establishment. Therefore the workers are entitled for payment of gratuity and the management is liable to pay the same.

In the *Management of S.I.E.T. Women's College, Madras* v. *Mohamed Ibrahim and others*,[1] the question was whether the provisions of the Payment of Gratuity Act, 1972 are applicable to the petitioner educational institution. According to Section 1(3)(b) of the Payment of Gratuity Act the Act applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State. It was held in *State of Punjab* v. *Labour Court, Jullunder and others*,[2] that Section 1(3)(b) of the Payment of Gratuity Act applied to every establishment within the meaning of any law for the time being in force in relation to an establishment in a State and it was not necessary that the law should be one relating to shops and establishments. It was held that Employees' Provident Funds and Miscellaneous Provisions Act, 1952 is applicable to educational institutions, therefore S.I.E.T. Women's College is an establishment within the meaning of law for the time being in force in relation to establishments in the State. It is not necessary that the law referred in Section 1(3)(b) of the Payment of Gratuity Act should be a law already in force in the concerned State and not any law which comes into force subsequently. It was further held that S.I.E.T. Women's College is also an establishment as defined in Section 2(c) of the Tamil Nadu Payment of Subsistence Allowance Act. Educational institution is an industry within the meaning of Industrial Disputes Act. Therefore the S.I.E.T. Women's College is an establishment falling within the purview of Section 1(3)(b) of the Payment of Gratuity Act, 1972.

In was held in *Poona Cantonment Board* v. *S.K. Das & others*,[3] that the only test of applicability of Section 1(3)(b) of the Act is that the establishment must be an establishment within the meaning of a specified type of law in the State. The section does not prescribe that such law must also apply to the establishment in question. In the present case Cantonment Board constituted under the Cantonment Act is 'establishment' within the meaning of Contract Labour (Regulation and Abolition) Act, 1970 as it is an establishment of a local authority. Therefore Section 1(3)(b) of the Payment of Gratuity Act, 1972 applies to Poona Cantonment Board.

It was held in *Shri Gurudeo Ayurved Mahavidyalaya & another* v. *Madhav Narayan Mahakode & others*,[4] that a society registered under the Societies Registration Act would be establishment covered by the Payment of Gratuity Act. Such society need not carry on business, trade or profession. A charitable or other trusts will have to carry on business, trade or profession. A registered society running Ayurved college is governed by provisions of Payment of Gratuity Act.

It was further held that the provisions of Payment of Gratuity Act would only amount to regulation in the interest of the minority institutions and not otherwise. Such regulatory laws do not impair or destroy the substance of right guaranteed by Article 30(1) of the Constitution to the minority communities. The provisions of the Payment of Gratuity Act are applicable to minority communities also.[5]

1. (1992) 1 Lab LJ 91 (Madras).
2. (1981) 1 Lab LJ 354 (SC).
3. (1993) 2 LLJ 487 (Bombay).
4. (1996) 1 LLJ 515 (Bom).
5. *The Management of S.I.E.T. Women's College, Madras* v. *Mohamed Ibrahim*, (1992) 1 Lab LJ 91 (Mad).

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In *Dorab Pirojsha Siganporia* v. *The President and Appellate Authority of Industrial Tribunal, Bombay*,[1] the question for determination was whether a firm of solicitors is a commercial establishment so as to attract the application of Payment of Gratuity Act. In this case a firm of solicitor was dissolved in August 1977 and the staff employed was taken over by a new firm. The staff taken over by the new firm claimed gratuity. Following the ratio in the case of *R.S. Deshpande and another* v. *Municipal Corporation of Greater Bombay*,[2] it was held that the office of an Advocate is not a commercial establishment within the meaning of Bombay Shops and Establishments Act. The definition of commercial establishment as per the Amending Act No. 64 of 1977 was already been struck down in the case of *Narendra Kesharichand Faladi and another* v. *State of Maharashtra*,[3] in so far as the amendment related to establishment of legal practitioners. Therefore, the pre-amendment definition has to be applied and the same does not include an advocate or solicitor's office. When the staff of a firm is taken over consequent upon the dissolution of the earlier firm and employees are continued by the new firm only the management has changed without affecting the terms and conditions of service of employees. Consequently the Payment of Gratuity Act has no application to such office.

It was held in *Unni Mammu Haji* v. *State of Kerala*,[4] that the Payment of Gratuity Act applies to shops and establishments in which 10 or more persons are employed. The State Act with respect to gratuity applies only to such establishments excluded by the Central Act. It was further held that the minimum period of one year of service to earn gratuity prescribed under the scheme is not unreasonable.

In *Chairman, Governing Body, S.M.V.M. Polytechnic, Tanuku (W.G. Dt.)* v. *Govt. of Andhra Pradesh & others*,[5] the question for consideration was whether a Physical Director of Polytechnic is eligible to claim gratuity under the Act. It was held that unless an educational institution is a commercial establishment, the Payment of Gratuity Act has no application. The Polytechnic was not an establishment covered by Section 1(3)(b) of the Act and therefore the Director Physical Education was not entitled to claim gratuity.

2. Definitions.—In this Act, unless the context otherwise requires :—

(a) **"appropriate Government"** means,—

(i) in relation to an establishment—

(a) belonging to, or under the control of, the Central Government,

(b) having branches in more than one State,

(c) of a factory belonging to or under the control of, the Central Government,

(d) of major port, mine, oil-field or railway company, the Central Government,

(ii) in any other case, the State Government.

(b) **"completed year of service"** means continuous service for one year ;

(c) **"continuous service"** means continuous service as defined in Section 2(A) ;

In *Lalappa Ligappa and others* v. *Laxmi Vishnu Textile Mills, Sholapur*,[6] the question for consideration was about the meaning of the term "Continuous service" as defined in Section 2(c) of the Payment of Gratuity Act, 1972. It was held that the

1. (1986) 2 Lab LJ 501 (Bom).
2. (1975) 2 Lab LJ 45.
3. (1985) 2 Lab LJ 24.
4. (1989) 2 Lab LJ 493 (Kerala).
5. (1989) 2 Lab LJ 95 (AP).
6. (1981) 1 Lab LJ 308 (SC).

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expression "actually employed" in Explanation I to Section 2(c),[1] in the context in which it occurs must mean "actually worked". The Supreme Court held that the High Court has right in holding that the permanent employees were not entitled to payment of gratuity for the years they remained absent without leave and had actually worked for less than 240 days in a year. It was also held that the *badli* employees are not covered by the substantive part of the definition of "continuous service" in Section 2(c) but come within Explanation I and therefore are not entitled to payment of gratuity for the *badli* period, *i.e.*, in respect of the years in which there was no work allotted to them due to their failure to report to duty.

(d) **"controlling authority"** means an authority appointed by the appropriate Government under Section 3 ;

(e) **"employee"** means any person (other than an apprentice) employed on wages, not exceeding two thousand and five hundred rupees per mensem, or such higher amount as the Central Government may, having regard to the general level of wages, by notification, specify in any establishment, factory, mine, oil-field, plantation, port, railway company or shop to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

Explanation.—In the case of an employee, who having been employed for a period of not less than five years on wages not exceeding the amount for the time being specified by or under clause (e), is employed at any time thereafter on wages exceeding that amount, gratuity, in respect of the period during which such employee was employed on wages not exceeding that amount shall be determined on the basis of the wages received by him during that period.

The Payment of Gratuity Act is a piece of social welfare legislation providing for payment of gratuity to all employees who have rendered continuous service for not less than five years.[2]

In *Patel Hiralal Ramlal & Co.* v. *Smt. Chandbibi Pirubhai*,[3] it was held that the workmen carrying raw materials from employers premises to their home and rolling up bidis at their own home for manufacturer are 'employee' under Section 2(e) and as such are entitled to payment of gratuity.

In *Anand Bazar Patrika (P) Ltd.* v. *Their Workmen*,[4] it has been held that if the main work done by an employee is of a clerical nature, the mere fact that some supervisory duties are also performed incidentally or as a small fraction of the work done by him will not convert his employment from clerical to supervisory capacity.

Similarly, in *Eastern Motors Pvt. Ltd.* v. *State of Assam*,[5] an employee who was doing mainly clerical work such as typing, keeping of accounts, correspondence and was also doing some managerial work such as operating bank account and taking legal actions against defaulter was held an employee within the meaning of Section 2(e) because managerial work was only incidental as against his substantive clerical work.

1. Explanation I to Section 2(c) as it stood prior to amendment by Act No. 26 of 1981 with effect from 11.2.1981.
2. *Jogendra Lal Malaker* v. *Regional Labour Commissioner (Central)*, 1977 Lab IC 1308.
3. 1981 Lab IC 790 (Guj).
4. 1969 (18) FLR 186 (SC).
5. 1981 Lab IC 230 (Gauhati).

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In *United India Insurance Co.* v. *H.K. Khatau & others*,[1] it was held that the field workers employed by the General Insurance Company are 'employee' within the meaning of Section 2(e) of the Act. These field workers were performing the manual work and the clerical work for the Insurance Company. They were held entitled for the benefit of the provisions of the Payment of Gratuity Act. It is impossible to assume that the scheme for payment of gratuity which provides for payment to other three categories of employees on the development side deliberately intended to exclude workers at the bottom from the advantage of gratuity. Even a trainee has been held an employee within the meaning of Section 2(e) of the Act.[2]

In *Satyawati Malhotra* v. *The State Warehousing Corporation, Haryana & another*,[3] an employee with managerial function drawing more than Rs. 1000/- as salary died on December 16, 1982 after rendering 18 years' service. His widow claimed gratuity. It was held that claim for gratuity has to be decided in accordance with law prevalent as on the date of death and subsequent amendment made in 1984 will not be applicable. Since the employee was not covered by the definition of employee as it existed on the date of his death, his widow is not entitled to claim gratuity under the Act.

In *Food Corporation of India* v. *Dyanuba K. Nikam & others*,[4] it was held that where an employee was drawing wages in excess of Rs. 1000 on the date of retirement gratuity shall be payable in accordance with explanation to Section 2(e) of the Act. He will be entitled to gratuity for the period for which the employee was employed on wages not exceeding Rs. 1000 per month and gratuity shall be limited to such period and it has to be calculated on the basis of wages received during that period.

It was held in *Shri Gurudeo Ayurved Mahavidayalya & another* v. *Madhav Narayan Mahakode and others*,[5] that when an employee at the time of his retirement was drawing more than the wages fixed by the Act, he should not be barred from claiming gratuity solely on that ground if it was found that he has put in 5 years of service when his wages were not exceeding the limit fixed by the Act.

In *Velukutty Achary* v. *Harrisons Malayalem Ltd.*[6] an employee was retrenched from service and subsequently such retrenched employee was engaged for wages for broken period whenever the work was available. No salary was paid to such person per month. It was held that such person is not an employee within the meaning of the Act and cannot claim his services to be continuous. It was further pointed out that only interruptions relating to sickness, accident, leave, absence from duty without leave, lay-off, strike or lock-out could not be treated as interruptions.

(f) **"employer"** means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop,

(i) belonging to, or under the control of, the Central Government or a State Government, a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed, the head of the Ministry or the Department concerned,

(ii) belonging to, or under the control of any local authority the person appointed by such authority for the supervision and control of

1. (1984) 1 Lab LJ 448 (Bom).
2. *Chairman-cum-Managing Director, Orissa Mining Corpn. Ltd.* v. *Controlling Authority, Payment of Gratuity Act & others*, (1995) 1 LLJ 381 (Orissa).
3. (1995) 1 LLJ 642 (P & H).
4. (1985) 1 Lab LJ 489 (Guj).
5. (1996) 1 LLJ 515 (Bombay).
6. (1993) 1 LLJ 1118 (Kerala).

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employees or where no person has been so appointed, the chief executive officer of the local authority,

(iii) in any other case, the person, who, or the authority which has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any name, such person.

(g) **"factory"** has the meaning assigned to it in clause (m) of Section 2 of the Factories Act, 1948 (63 of 1948).

(h) **"family"** in relation to an employee, shall be deemed to consist of—

(i) in the case of a male employee, himself, his wife, his children, whether married or unmarried, his dependent parents and the dependent parents of his wife and the widow and children of his predeceased son, if any,

(ii) in the case of a female employee, herself, her husband, her children, whether married, or unmarried, her dependent parents and the dependent parents of her husband and the widow and children of her predeceased son, if any.

Explanation.—Where the personal law of an employee permits the adoption by him of a child, any child lawfully adopted by him shall be deemed to be included in his family and where a child of an employee has been adopted by another person and such adoption is under the personal law of the person making such adoption lawful such child shall be deemed to be excluded from the family of the employee.

(i) **"major port"** has the meaning assigned to it in clause (8) of Section 3 of the Indian Ports Act, 1908 (15 of 1908).

(j) **"mine"** has the meaning assigned to it in clause (j) of sub-section (1) of Section 2 of the Mines Act, 1952 (35 of 1952).

(k) **"notification"** means a notification published in the Official Gazette.

(l) **"oilfield"** has the meaning assigned to it in clause (e) of Section 3 of the Oilfields (Regulation and Development) Act, 1948 (53 of 1948).

(m) **"plantation"** has the meaning assigned to it in clause (f) of Section 2 of the Plantation Labour Act, 1951 (69 of 1951).

(n) **"port"** has the meaning assigned to it in clause (4) of Section 3 of the Indian Ports Act, 1908 (15 of 1908).

(o) **"prescribed"** means prescribed by rules made under this Act.

(p) **"railway company"** has the meaning assigned to it in clause (5) of Section 3 of the Indian Railways Act, 1890 (9 of 1890).

(q) **"retirement"** means termination of the service of an employee otherwise than on superannuation.

(r) **"superannuation"**, in relation to an employee, means the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employee shall vacate the employment.

(s) **"wages"** means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.

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2-A. Continuous Service.—For the purposes of this Act,—

(1) an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lockout or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

(2) Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer—

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—
  (i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days, in a week ; and
  (ii) two hundred and forty days, in any other case ;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than—
  (i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week ; and
  (ii) one hundred and twenty days in any other case ;

Explanation.—For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which—

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under the Industrial Disputes Act, 1947, or under any other law applicable to the establishment ;

(ii) he has been on leave with full wages, earned in the previous year ;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment ; and

(iv) in the case of a female, she has been on maternity leave ; so, however, that the total period of such maternity leave does not exceed twelve weeks.

(3) Where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy-five per cent of the number of days on which the establishment was in operation during such period.

In *D.B.R. Mills Ltd.* v. *Appellate Authority, under Payment of Gratuity Act,*[1] the question for determination was whether public holidays including Sundays are to be excluded computing 240 days. It was held that the cessation of work by the employees on these days cannot be said to be due to any fault of the employee. Therefore he would be deemed to be in continuous service if he has been actually employed by an employer

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1. (1985) 1 Lab LJ 181 (AP).

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during the 12 months, immediately preceding the year for not less than 240 days in an establishment.

3. Controlling Authority.—The appropriate Government may, by notification, appoint any officer to be a controlling authority, who shall be responsible, for the administration of this Act and different controlling authorities may be appointed for different areas.

4. Payment of gratuity.—(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,—

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease :

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement :

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or if no nomination has been made to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation.—For the purpose of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned :

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment and, for this purpose, the wages paid for any over time work shall not be taken into account :

Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of fifteen days' wages for each season.

Explanation.—In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed three lakh and fifty thousand rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1)—

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or

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destruction of property belonging to the employer shall be forfeited to the extent of the damage or loss so caused ;

(b) the gratuity payable to an employee may be wholly or partly forfeited—

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

(7) For the removal of doubts, it is hereby declared that the gratuity determined in accordance with the provisions of Explanation to clause (e) of Section 2 shall be payable to an employee referred to in that clause notwithstanding that immediately, or at any time, before termination of his employment in the manner specified in clause (a) or clause (b) or clause (c) of sub-section (1) he was in receipt of—

(i) where such termination of his employment is before the commencement of the Payment of Gratuity (Amendment) Act, 1984 wages exceeding one thousand rupees per month and,

(ii) where such termination of his employment is after such commencement wages exceeding one thousand and six hundred rupees per month.

For the purpose of claiming gratuity under the Act, the employee must have rendered continuous service for a period of 5 years. Where such period of service has not been rendered gratuity shall not be paid under the Act. Where an employee claims gratuity on the basis of an agreement it was held in *D.S. Purwar* v. *Elphinstone Spinning and Weaving Mills*,[1] that claim of gratuity on the basis of an agreement is outside the scope of adjudication under the Payment of Gratuity Act, 1972.

In *Duncan Agro Industries Limited* v. *Subanna B.*,[2] the question involved for determination was whether the workmen were entitled for gratuity for the period of service rendered before coming into force of this Act. It was held that gratuity is payable to an employee who has rendered continuous service of not less than five years and continuous service in view of provisions of Section 2(c) which defines 'continuous service' as service whether rendered prior or after commencement of the Act, workmen would be entitled for gratuity for the period of service rendered prior to or after the commencement of the Act.

In *Rashtriya Mill Mazdoor Sangh* v. *National Textile Corporation (South Maharashtra) Ltd. & others*,[3] Mr. Mohan Sambhaji Parab, respondent No. 2 was an employee of Finlay Mills Ltd., the respondent No. 3 from January 1, 1954 to March 22, 1983 when he resigned. He made a claim for gratuity from respondent No. 3 *i.e.*, Finlay Mills Ltd. In the meantime textile mills including Finlay Mills Ltd. were taken over by the Central Government and the National Textile Corporation started looking after the management with effect from October 18, 1983. Since respondent No. 3 (*i.e.*, Finlay Mills Ltd.) failed to pay the amount of gratuity, respondent No. 2 moved the Controlling Authority under the Payment of Gratuity Act for recovery of the gratuity amount against the National Textile Corporation. It was held that liability to pay gratuity arises on the date of resignation, superannuation or retirement etc. Such liability if arises prior to the date of taking over of management of textile undertakings by the National Textile Corporation, would be that of owners of Textile undertakings and not of National Textile Corporation.

In case of an employee drawing wages exceeding Rs. 1000/- per month on the

1. 1986 (53) FLR 600 (Bom).
2. (1984) 1 Lab LJ 96 (AP).
3. (1996) 1 LLJ 787 (SC).

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date of coming into force of Payment of Gratuity Act, the gratuity is payable if the termination of the employment is after the date of coming into force of the Act for that period during which the employee came within the definition of "Employee" under Section 2(e) of the Act. A person whose services are terminated for the reasons mentioned in Section 4(1) of the Act after coming into force of the Act is entitled to payment of gratuity if he has rendered continuous service for not less than five years for that period during which he satisfied the definition of employee under Section 2(e) of the Act.[1]

It was held in *Bakshish Singh* v. *M/s. Darshan Engineering Works and others*,[2] that the provision for payment of gratuity contained in Section 4(1)(b) of the Act is one of the minimum service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden and the said provisions are a reasonable restriction on the right of the employer to carry on his business within the meaning of Article 19(6) of the Constitution. Hence Section 4(1)(b) of the Act is valid and legal.

In *Kathayee Cotton Mills* v. *Gopala Pillai*[3] it was held that the term month has not been defined in Section 2 of the Payment of Gratuity Act. Therefore in the absence of a definition giving a different meaning there is no justification for departing from the meaning given to the term in common parlance. In common parlance a month is understood to mean a period of 30 days. Therefore, for the purpose of Section 4(2) of the Act, for arriving at the daily wages of the employee in the case of a monthly rated employee the total monthly wages of the employee, reckonable for the purpose, should be divided by 30.

In *Lakshmi Vishnu Textile Mills* v. *P.S. Mavlankar*,[4] the Bombay High Court held that the rate of 15 days' wages under Section 4(2) cannot be construed to 13 days' wages and if so then the wages for 20 months covering 600 days also cannot be reduced to 520 days wages.

In *Shri Digvijay Woollen Mills Ltd.* v. *Shri Mahendra Prataparai Buch*,[5] the question was as to how to calculate 15 days' wages for the purpose of payment of gratuity in terms of Section 4(2) of the Act. It was held that the view of the Gujarat High Court in following the pattern of fixation of wages by the method of 26 working days appears to be legitimate and reasonable. Ordinarily, of course, a month is understood to mean 30 days, but the manner of calculating gratuity payable under the Act to the employee, the work of 26 days a month followed by the Gujarat High Court cannot be called perverse. Treating monthly wages as wages for 25 working days is not anything unique or unknown as is evident from the decision of the Supreme Court in *Delhi Cloth and General Mills Ltd.* v. *Workmen*.[6]

In *Jeewan Lal (1929) Ltd.* v. *Appellate Authority & others*,[7] the question was whether for the purpose of computation of fifteen days wages of a monthly rated employee under sub-section (2) of Section 4, the monthly wages last drawn by him should be treated as wages for 26 working days and his daily wages should be ascertained on that basis or it should be taken as the wages for a month of 30 days and thus while fixing his daily wages his monthly wages should be divided by 30. It was held that the amount of gratuity does not depend on the number of days in a calendar

1. *The Management of Goodyear India Ltd.* v. *Shri K.G. Devassar*, (1986) 1 Lab LJ 25 (SC).
2. (1994) 1 LLJ 197 (SC).
3. (1980) 1 Lab LJ 356 (Kerala).
4. (1979) 2 Lab LJ 443 (Bom).
5. (1980) 2 Lab LJ 252 (SC).
6. (1969) 2 Lab LJ 755 (SC).
7. (1982) 2 Lab LJ 400 (SC).

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month nor it refers to 26 working days in a month. Instead the whole object is to ensure payment of gratuity at the rate of 15 days' wages for 365 days in a year of service. If the determination of the amount of gratuity payable under Section 4(2) depends on the number of calender days in a month in which the services of the employee concerned terminate, the quantum of gratuity payable would vary between an employee and an employee belonging to the same class, drawing the same scale of wages with like service for the same number of years. The total amount of gratuity payable has to be arrived at by multiplying the fifteen days wages so arrived at by the number of years of service rendered by an employee subject to the ceiling imposed by Section 4(3) *viz.*, the amount shall not exceed 20 months' wages.

It was held in *D.B.R. Mills Ltd.* v. *Appellate Authority under Payment of Gratuity Act*,[1] that fifteen days' wages for every completed year of service have to be calculated on the basis of wages paid to an employee for the month divided by 26 days and the quotient multiplied by 15 days.

In view of the provisions of Section 4(3) of the Payment of Gratuity Act, 1972, the amount of gratuity payable shall not exceed one lakh rupees. This ceiling limit has been fixed by the Amendment Act of 1994. The maximum amount of gratuity payable was fixed at twenty months' wages prior to the amendment of Section 4(3) when this amount was fixed as Rs. 50,000. In the *Regional Manager, Punjab National Bank, Kanpur* v. *Regional Labour Commissioner (Central) Kanpur & others*,[2] the employee was awarded gratuity exceeding twenty months' wages by an order dated April 9, 1986. It was held that the employee is not entitled to any amount of gratuity in excess of twenty months' wages.

In *Bharath Gold Mines Ltd.* v. *Regional Labour Commissioner*,[3] a workman was guilty of theft committed in the course of employment. In the opinion of the management the offence amounted to an offence involving moral turpitude and the workman was dismissed on this ground and hence the gratuity was forfeited. It was held that after amendment of the year 1984 notice to show cause against forfeiture of gratuity was mandatory and its non-compliance renders the forfeiture as illegal.

In *D.K. Savitramma* v. *Ananpur District Co-operative Central Bank & another*,[4] enquiry was initiated against an employee on the basis of audit report. During the pendency of enquiry the employee died and the report of enquiry was made after his death. The management had given notice of enquiry to the employee. The wife claimed gratuity, bonus and reimbursement of medical benefits under Section 33-C(2) of the Industrial Disputes Act, 1947. The Tribunal held that an application for gratuity is not maintainable under the Industrial Disputes Act, instead remedy is available under the Payment of Gratuity Act. It also directed the Management to give notice of inquiry to the claimant and hold an inquiry with regard to the amount misappropriated by the employee. If on enquiry the amount is found misappropriated the management can appropriate the gratuity under Section 4(6) of the Payment of Gratuity Act. It is against this order that a petition was moved. It was held by the High Court that the effect of the proceedings initiated after retirement or dismissal of an employee is different from the proceedings that have been initiated for misconduct during the life time of the employee before his retirement. Since the proceedings have already been initiated in the case before the death of the employee while he was in service, the Bank is at liberty to conduct inquiry after issuing notice to the legal representatives and complete the inquiry in the presence of legal representatives. In the event of giving a direction to pay the

1. (1985) 1 Lab LJ 181 (AP).
2. (1995) 1 LLJ 852 (All).
3. (1990) 2 LLJ 1 (Ker).
4. (1991) 2 Lab LJ 350 (AP).

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gratuity and pension immediately the possibility of recovering the amount found to have been misappropriated by the employee would be nil, as the petitioner has no other property. By virtue of the death of the employee the court is not expected to convert the misfortune into one of the windfall and the court has to strike out equitable balance, so that either party may not suffer. The court has to see that the gratuity and pension amount be paid at the earliest time. Merely because the employee died during pendency of the charges, it cannot be said that the Bank or the employer has no authority to continue that proceedings. The proceedings with regard to misappropriation have to be completed, but in the event of the death of an employee, those proceedings have to be completed in the presence of the affected persons, so that, in the event of finding any amount due, they may not claim that the action of the employer is arbitrary, capricious and behind their back. In the event of the death or termination of an employee and if the charges of misconduct have been proved, the employer is entitled to deduct the whole of the financial loss caused by his misconduct from out of the gratuity claimable and the employee or his legal representatives are entitled only for the remaining amount. If the amount due on account of gratuity as per rules has to be payable immediately without settling the amount misappropriated, it amounts to causing prejudice to the employer in recovering the amount found to have been misappropriated.

In *Cominco Binani Zinc Ltd.* v. *Pappachan*,[1] the company which was obliged under Section 46 of the Factories Act to run a canteen entrusted the running of canteen to a contractor. The workmen employed by the contractor claimed bonus and gratuity from the company, which claim was upheld by the Industrial Tribunal. The High Court held that the finding that the workers in the canteen are directly employed by the management that they are integral part of the factory and therefore entitled to gratuity from the management is against law because the workers in the canteen are not employees of the management but of the contractor.

It was held in *Bombay Gas Public Ltd. Co.* v. *Papa Akbar and another*,[2] that the provisions of Section 4(6)(a) of the Payment of Gratuity Act, 1972 do not come into operation unless there is a termination on the grounds set out therein. The statutory provision for forfeiture of gratuity must be construed strictly. In this case there was no material to show that the services of the employees were terminated for any act, wilful omission or negligence causing damage, loss, or destruction to the employers' property. The extent of such damage attributable to the employee is not quantified. Merely stating that the employee went on an illegal strike and thereby caused a heavy loss to the company is not a ground for denying gratuity.

4-A. Compulsory Insurance.—(1) With effect from such date as may be notified by the appropriate Government in this behalf, every employer, other than an employer or an establishment belonging to, or under the control of, the Central Government or a State Government, shall, subject to the provisions of sub-section (2), obtain an insurance in the manner prescribed for his liability for payment towards the gratuity under this Act, from the Life Insurance Corporation of India established under the Life Insurance Corporation of India Act,1956 (31 of 1956) or any other prescribed insurer :

Provided that different dates may be appointed for different establishments or class of establishments or for different areas.

(2) The appropriate Government may, subject to such conditions as may be prescribed, exempt every employer who had already established an approved gratuity fund in respect of his employees and who desires to continue such arrangement and

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1. (1989) 1 Lab LJ 425 (Kerala).
2. (1990) 2 Lab LJ 220 (Bom).

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every employer employing five hundred or more persons who establishes an approved gratuity fund in the manner prescribed from the provisions of sub-section (1).

(3) For the purpose of effectively implementing the provisions of this section, every employer shall within such time as may be prescribed get his establishment registered with the controlling authority in the prescribed manner and no employer shall be registered under the provisions of this section unless he has taken an insurance referred to in sub-section (1) or has established an approved gratuity fund referred to in sub-section (2).

(4) The appropriate Government may, by notification, make rules to give effect to the provisions of this section and such rules may provide for the composition of the Board of Trustees of the approved gratuity fund and for the recovery by the controlling authority of the amount of the grauity payable to an employee from the Life Insurance Corporation of India or any other insurer with whom an insurance has been taken under sub-section (1), or as the case may be, the Board of Trustees of the approved gratuity fund.

(5) Where an employer fails to make any payment by way of premium to the insurance referred to in sub-section (1) or by way of contribution to an approved gratuity fund referred to in sub-section (2), he shall be liable to pay the amount of gratuity due under this Act (including interest, if any, for delayed payments) forthwith to the controlling authority.

(6) Whoever contravenes the provisions of sub-section (5) shall be punishable with fine which may extend to ten thousand rupees and in the case of a continuing offence with a further fine which may extend to one thousand rupees for each day during which the offence continues.

Explanation.—In this section approved "gratuity fund" shall have the same meaning as in clause (v) of Section 2 of the Income-tax Act, 1961.

5. Power to exempt.—(1) The appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits concerned under this Act.

(2) The appropriate Government may, by notification and subject to such conditions as may be specified in the notification, exempt any employee or class of employees employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act, if, in the opinion of the appropriate Government, such employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the benefits concerned under this Act.

(3) A notification issued under sub-section (1) or sub-section (2) may be issued retrospectively from a date not earlier than the date of commencement of this Act, but no such notification shall be issued as to prejudicially affect the interests of any person.

6. Nomination.—(1) Each employee, who has completed one year of service, shall make, within such time, in such form and in such manner, as may be prescribed, nomination for the purpose of the second provisonto sub-section (1) of Section 4.

(2) An employee may, in his nomination, distribute the amount of gratuity payable to him under this Act amongst more than one nominee.

(3) If an employee has a family at the time of making a nomination, the nomination shall be made in favour of one or more members of his family, and any

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nomination made by such employee in favour of a person who is not a member of his family shall be void.

(4) If at the time of making a nomination the employee has no family, the nomination may be made in favour of any person or persons but if the employee subsequently acquires a family, such nomination shall forthwith become invalid and the employee shall make, within such time as may be prescribed, a fresh nomination in favour of one or more members of his family.

(5) A nomination may, subject to the provisions of sub-sections (3) and (4), be modified by an employee at any time, after giving to his employer a written notice in such form and in such manner as may be prescribed, of his intention to do so.

(6) If a nominee predeceases the employee, the interest of the nominee shall revert to the employee who shall make a fresh nomination, in the prescribed form, in respect of such interest.

(7) Every nomination, fresh nomination or alteration of nomination, as the case may be be, shall be sent by the employee to his employer, who shall keep the same in his safe custody.

7. Determination of the amount of gratuity.—(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3-A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify :

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

(4)(a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

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(d) The controlling authority shall pay the amount deposited, including the

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excess amount, if any, deposited by the employer to the person entitled thereto.

(e) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit—

(i) to the applicant where he is the employee ; or

(ii) where the applicant is not the employee, to the nominee or as the case may be, the guardian of such nominee or heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under sub-section (4), the controlling authority shall have the same powers as are vested in court, while trying a suit, under the Code of Civil Procedure 1908, (5 of 1908) in respect of the following matters, namely—

(a) enforcing the attendance of any person or examining him on oath ;

(b) requiring the discovery and production of documents ;

(c) receiving the evidence on affidavits ;

(d) issuing commissions for the examination of witnesses.

(6) Any inquiry under this section shall be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code. (45 of 1860).

(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf :

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days :

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellants either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount.

(8) The appropriate Government or the appellate authority, as the case may be, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority.

In *Mandar Union Sanatorium and Hospital* v. *M.B. Sathe and others*,[1] it was held that the word "determination" in Section 7 of the Payment of Gratuity Act includes the determination of the liability and while determining the liability the authority can say that there exists no liability. As for the payment of interest for delayed payment of gratuity is concerned the court held that there is no provision prohibiting the payment of interest by way of compensation and the court has inherent power to grant relief. The payment of interest was ordered to be paid not as interest but by way of compensation for the delayed payment of gratuity. Even the Supreme Court has held that when there is no prohibition then the court has inherent powers to compensate the deserving persons for the loss which has been caused to them. Sections 4 and 7 of the Act in so far as they relate to minority institutions run for philanthropic purposes are valid and legal. Therefore, Mandar Union Sanatorium Hospital is an establishment governed by the provisions of the Payment of Gratuity Act, 1972.

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1. (1986) 2 Lab LJ 135 (Rajasthan).

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In *Charan Singh* v. *Birla Textiles and another*,[1] it was held that there is no provision in the Act for payment of interest when gratuity is qualified by the controlling authority and before the Collector is approached for its realisation. At the stage of recovery of gratuity the controlling authority can issue a certificate to the Collector to recover gratuity with interest.

In *The Management of Khas Karanpura Colliery of M/s. Central Coal Fields Ltd.* v. *Regional Labour Commissioner & others*,[2] it was held that the Authority constituted under Section 7 of the Act shall have to compute grautity for each year admissible keeping in view the wages drawn that year and this shall go on till each started receiving wages upto Rs. 1000/- (*i.e.*, the maximum limit fixed under Section 2(e) of the Act). It is not open to the Authority to take Rs. 1000/- (*i.e.*, the maximum fixed) as earning for each month and direct payment of gratuity on that basis.

It was held in *City College Calcutta* v. *State of West Bengal and others*,[3] that the appellate authority constituted for the purpose of Section 7 of the Payment of Gratuity Act, 1972 does not have power to condone delay of more than 120 days in filing the appeal. Under Section 7, appeal should be filed within 60 days from the date of receipt of the order of the controlling authority. This period can be extended for a further period of 60 days in the discretion of the appellate authority but thereafter there is no scope for further extension beyond 120 days under Section 5 of the Limitation Act. The Appellate Authority is not a court but an executive authority vested with *quasi*-judicial powers and therefore provisions of the Limitation Act do not apply.

In *National Textile Corporation* v. *Additional Labour Commissioner*,[4] the control of the mill was taken over by the Central Government and the workmen filed their gratuity claim before the competent authority appointed by the State Government. It was held that the order passed by the authority appointed by the State Government will be null and void. Any such claim ought to have been filed before the authority appointed by the Central Government.

The law as it stood prior to addition of sub-section (3-A) of Section 7 of Payment of Gratuity Act, 1972 did not provide the payment of interest. Sub-section (3-A) was to apply prospectively from October 1, 1987. Prior to insertion of sub-section (3-A) the Controlling Authority had no power to grant any interest. Section 8 of the Act does not empower Controlling Authority to grant compound interest.[5]

It was held in *Bombay Gas Public Ltd. Co.* v. *Papa Akbar and another*,[6] that sub-section (3-A) was introduced to Section 7 for the first time only by the Amending Act 22 of 1987 which came into force on 12th August, 1987. Where the application has been made before coming into operation of the Amending Act, the benefit of payment of simple interest on gratuity as provided by sub-section (3-A) of Section 7 which was added by the Amending Act of 1987 cannot be given.

Sub-section (3) of Section 7 of the Payment of Gratuity Act, 1972 was substituted by new sub-sections (3) and (3-A) by Amendment Act of 1987. Sub-section (3-A) provides for payment of interest in case of non-payment of gratuity amount under sub-section (3) of Section 7 of the Act. It was held in *Hindustan Petroleum Corporation Ltd.* v. *P.T. Vijayan and others*,[7] that sub-section (3-A) of Section 7 will be applicable

1. (1989) 1 Lab LJ 250.
2. (1989) 2 Lab LJ 395 (Patna).
3. (1987) 1 Lab LJ 41 (Calcutta).
4. (1987) 54 FLR 299 (All).
5. *Shri Gurudeo Ayurved Mahavidyalaya & another* v. *Madhav Narayan Mahakode and others*, (1996) 1 LLJ SLS (Bom).
6. (1990) 2 Lab LJ 220 (Bom).
7. (1995) 2 LLJ 954 (Bom).

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to all cases where the application for payment of gratuity has been made after the coming into force of the amendment or in cases where the amount of gratuity has been determined and notice given to the person to whom gratuity is payable after coming into force of sub-section (3-A) of the Act.

It was held in *M/s. Sahkari Ganna Vikas Samiti Ltd.* v. *Controlling Authority under Payment of Wages Act*[1] that production of certificate of Controlling Authority evidencing deposit of gratuity amount by the employer is necessary for preferring an appeal under Section 7(7) of the Payment of Gratuity Act, 1972. However, non-compliance of condition with regard to production of certificate and deposit does not result in dismissal of appeal. It is only consigned and the appellant can be directed to deposit the gratuity amount with Appellate Authority.

7-A. Inspectors.—(1) The appropriate Government may by notification, appoint as many Inspectors, as it deems fit, for the purposes of this Act.

(2) The appropriate Government may, by general or special order, define the area to which the authority of an Inspector so appointed shall extend and where two or more Inspectors are appointed for the same area, also provide, by such order, for the distribution or allocation of work to be performed by them under this Act.

(3) Every Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

7-B. Powers of Inspectors.—(1) .Subject to any rules made by the appropriate Government in this behalf, an Inspector may, for the purpose of ascertaining whether any of the provisions of this Act or the conditions, if any, of any exemption granted thereunder, have been complied with exercise all or any of the following powers, namely :—

(a) required an employer to furnish such information as he may consider necessary ;

(b) enter and inspect, at all reasonable hours, with such assistant (if any), being persons in the service of the Government or local or any public authority, as he thinks fit, any premises of or place in any factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, for the purposes of examining any register, record or notice or other document required to be kept or exhibited under this Act or the rules made thereunder, or otherwise kept or exhibited in relation to the employment of any person or the payment of gratuity to the employees, and require the production thereof for inspection ;

(c) examine with respect to any matter relevant to any of the purposes aforesaid, the employer or any person whom he finds in such premises or place and who, he has reasonable cause to believe, is an employee employed therein ;

(d) make copies of or take extracts from, any register, record, notice or other document as he may consider relevant and where he has reason to believe that any offence under this Act has been committed by an employer, search and seize with such assistance as he may think fit such register, record, notice or other documents as he may consider relevant in respect of that offence ;

(e) exercise such other powers as may be prescribed.

(2) Any person required to produce any register, record, notice or other document or to give any information by an inspector under sub-section (1) shall be deemed to be legally bound to do so within the meaning of Sections 175 and 176 of the Indian Penal Code (45 of 1860).

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1. (1993) 2 LLJ 1108 (All).

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(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply to any search or seizure under this section as they apply to any search or seizure made under the authority of a warrant issued under Section 94 of that Code.

8. Recovery of Gratuity.—If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same, together with compound interest thereon at such rate as the Central Government may, by notification, specify from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto :

Provided that the controlling authority shall, before issuing a certificate under this section, give the employer a reasonable opportunity of showing cause against the issue of such certificate :

Provided further that the amount of interest payable under this section shall, in no case, exceed the amount of gratuity payable under this Act.

In *Champaran Sugar Company Ltd.* v. *The Joint Labour Commr. and the Appellate Authority*,[1] it was held that by virtue of provisions of Section 8 of the Act payment of interest on gratuity amount is the mandate of law itself and is not dependent on an express claim by the employee thereof. The right to interest accrues to the employee from the failure of the employer to perform his statutory duty to tender and pay gratuity and not from any formal demand thereof by the employee. Similarly the liability to pay interest does not stem from the certificate of the Controlling Authority but from the default in the performance of his duty by the employer.

9. Penalties.—(1) Whoever, for the purpose of avoiding any payment to be made by himself under this Act or of enabling any other person to avoid such payment, knowingly makes or causes to be made any false statement or false representation shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both.

(2) An employer who contravenes, or makes default in complying with any of the provisions of this Act or any rule or order made thereunder shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or with both :

Provided that where the offence relates to non-payment of any gratuity payable under this Act, the employer shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years unless the court trying the offence, for reasons to be recorded by it in writing, is of opinion that a lesser term of imprisonment or the imposition of a fine would meet the ends of justice.

10. Exemption of Employer from Liability in certain cases.—Where an employer is charged with an offence under this Act, he shall be entitled upon complaint duly made by him and on giving to the complainant not less than three clear days' notice in writing of his intention to do so, to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge ; and if, after the commission of the offence has been proved, the employer proves to the satisfaction of the court :

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance,

that other person shall be convicted of the offence and shall be liable to the like

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1. 1987 (54) FLR 50 (Patna).

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punishment as if he were the employer and the employer shall be discharged from any liability under this Act in respect of such offence :

Provided that in seeking to prove as aforesaid, the employer may be examined on oath and his evidence and that of any witness whom he calls in his support shall be subject to cross-examination on behalf of the person he charges as the actual offender and by the prosecutor :

Provided further that, if the person charged as the actual offender by the employer cannot be brought before the court at the time appointed for hearing the charge, the court shall adjourn the hearing from time to time for a period not exceeding three months and if by the end of the said period the person charged as the actual offender cannot still be brought before the court, the court shall proceed to hear the charge against the employer and shall, if the offence be proved, convict the employer.

11. Cognizance of Offences.—(1) No court shall take cognizance of any offence punishable under this Act save on a complaint made by or under the authority of the appropriate Government :

Provided that where the amount of gratuity has not been paid, or recovered, within six months from the expiry of the prescribed time, the appropriate Government shall authorise the controlling authority to make a complaint against the employer, whereupon the controlling authority shall, within fifteen days from the date of such authorisation, make such complaint to a magistrate having jurisdiction to try the offence.

(2) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

12. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against the controlling authority or any other person in respect of anything which is in good faith done or intended to be done under this Act or any rule or order made thereunder.

13. Protection of Gratuity.—No gratuity payable under this Act and no grauity payable to an employee employed in any establishment, factory, mine, oilfield, planatation, port, railway, company or shop extended under Section 5 of the Act shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.

By virtue of the provisions of Section 13 of the Act the gratuity payable to a workman is not liable to attachment.[1]

14. Act to override other enactments, etc.—The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.

Section 14 of the Act lays down that the provisions of the Act or any rule made thereunder will have overriding effect over any other enactment. It therefore, follows that even if the employee had made a mistake in the calculation of the gratuity amount and received a lesser amount than what he is entitled to, he will not be estopped or barred in law from claiming the balance amount due to him or initiating proceedings envisaged under the Act and rules for recovering the balance amount due to him.[2] Merely because the employee had taken the initiative and asked for the payment of gratuity at a particular sum, the employer will not stand absolved of his statutory obligation to pay the employee the proper amount of gratuity he is entitled to.[3]

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1. *Calcutta Dock Labour Board* v. *Smt. Sahdhya Mitra*, 1985 (50) FLR 322 (SC).
2. *Jeevan Lal* (1929) *and others* v. *Controlling Authority under the Payment of Gratuity Act, and others*, (1982) 1 Lab LJ 86 (Mad).
3. *Ibid.*

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Section 14 of the Payment of Gratuity Act, 1972 provides that the provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act. The Orissa Mining Corporation Employees Gratuity Fund Rules exclude a trainee from the definition of employee. It was held in *Chairman-cum-Managing Director, Orissa Mining Corpn. Ltd.* v. *Controlling Authority, Payment of Gratuity Act & others*,[1] that any inconsistency between the Orissa Mining Corporation Rules and the Payment of Gratuity Act will, in view of provisions of Section 14 of the Payment of Gratuity Act, give way to the provisions specifically made in the Payment of Gratuity Act. Therefore notwithstanding the prescription in the Corporation rules an employee putting in five years continuous service, as provided in Section 4(1) of the Payment of Gratuity Act would be entitled to the benefits under the Act. The Corporation rule being inconsistent with the Payment of Gratuity Act was struck down.

In *National Textile Corporation (South Mah.) Ltd.* v. *Bhagirathi Gopal Martal & others*,[2] an employee named Gopal Laxman of Textile Mill retired on 1st April 1983. As gratuity due to him was not paid he filed an application on June 6, 1983, before Controlling Authority. On October 18, 1983 the management of the mill was taken over by the Central Government. On March 8, 1984 he made an application to implead the petitioner Corporation as well which was allowed. During the pendency of the claim application the employee died and his wife was substituted in his place. It was held that the liability incurred by a textile mill prior to the taking over of the management cannot be enforced against the Central Government or the custodian in view of Section 3(7) of the Textile Undertakings (Taking over of Management) Act, 1983. In other words the liability accruing prior to the appointed date shall continue to be liability of the Textile Mill. Therefore the gratuity amount cannot be recovered from the National Textile Corporation.

It was further held that Section 14 of the Payment of Gratuity Act, 1972 is a *non-obstante* provision and is couched in a very wide language. Similarly, Section 7 of the Textile Undertakings Act, 1983 also contains a *non-obstante* proviso and is couched in an equally wide language. The Gratuity Act is a general Act applicable to all categories of establishments falling therein, whereas the Textile Undertakings Act is a special Act which is applicable to sick textile mills only. The Gratuity Act was enacted in 1972 and the Textile Undertaking Act was enacted in 1983. Hence the provisions of Textile Undertakings Act being later in point of time will prevail over the Payment of Gratuity Act, 1972. The object of the later Act is that a sick mill should run so that the workmen continue to remain employed. In view of policy of the Textile Undertakings Act as well as the fact that in point of time the taking over Act is later, the *non-obstante* clause of Section 14 of the Payment of Gratuity Act will not apply because of Section 3(7) read with Section 7 of the Textile Undertakings Act.

The rules governing the service conditions of the employees of the establishment of Regional Provident Fund Commissioner, Bangalore, provided that a person who has tendered his resignation shall not be entitled to gratuity. The question relating to entitlement of gratuity in case of resignation came up before the Karnataka High Court in *Regional Provident Fund Commissioner* v. *Regional Labour Commissioner and others*,[3] It was held that the establishment of Regional Provident Fund Commissioner is an establishment within the meaning of Section 1(3) of the Payment of Gratuity Act. The Payment of Gratuity Act applies to every establishment within the meaning of any

1. (1995) 1 LLJ 381 (Orissa).
2. (1992) 2 Lab LJ 111 (Bom).
3. (1985) 2 Lab LJ 63 (Karnataka).

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law for the time being in force in relation to such establishment in a State. According to the definition of establishment under the Contract Labour (Regulation and Abolition) Act, 1970 of Karnataka State an officer like the above one is also included. Hence the Payment of Gratuity Act applies to the establishment of Regional Provident Fund Commissioner, Bangalore. Section 14 of the Payment of Gratuity Act does not disentitle an employee from claiming gratuity in case of resignation. Therefore the provisions of Section 14 of the Payment of Gratuity Act shall have overriding effect over the service regulations and even such a person is entitled to claim gratuity under the Act.

In *Municipal Board Khurja* v. *Appellate Authority and Addl. Labour Commissioner Kanpur*,[1] the Municipal Board, Khurja was held to be an establishment. Therefore by virtue of Section 14 of the Act the provisions of Payment of Gratuity Act would apply to its employees even though they are participants of provident fund benefits under Section 76(3) of the U.P. Municipalities Act which specifically provides that a person who participates in provident fund benefit shall not be entitled to gratuity.

15. Power to make rules.—(1) The appropriate Government may, by notification, make rules for the purpose of carrying out the provisions of this Act.

(2) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament which is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that rule should not be made, the rule shall, thereafter, have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

It was held in *M. Devarajulu* v. *Asst. Commissioner of Labour & others*,[2] that where a time limit is prescribed for initiation of proceedings and such proceeding is initiated after the expiry of time limit and it is accompanied by an application for condoning delay, the adjudicating authority must dispose of the application for condonation of delay after hearing the parties. Beofre the main claim petition is disposed of on merit, the delay should first be considered and condoned.

16. Validation.—The amendments made in the principal Act by Section 3 and Section 4 shall be deemed to have been made with effect from the 11th day of February, 1981 and accordingly any action or thing taken or done or purporting to have been taken or done under the principal Act, on or after the said date and before the commencement of this Act, shall, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, be deemed to be, and to have always been, for all purposes, as validly and effectively taken or done as if the said amendment had been in force at all material times.

Explanation.—For the removal of doubts, it is hereby declared that no act or omission on the part of any person, before the commencement of this Act, shall be punishable as an offence which would not have been so punishable if this Act had not come into force.

This section deals with validation of the amendment made in the original Act by Sections 3 and 4 of the Amendment Act, No. 26 of 1984 with retrospective effect. The amendments made by Sections 3 and 4 of the Amendment Act No. 26 of 1984 have been made effective retrospectively from 11th February, 1981.

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1. 1986 (53) FLR 227 (All).
2. (1995) 1 LLJ 348 (Mad).

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THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

INTRODUCTION

Almost one third of the world population comprises children. Therefore, they deserve to be cared and protected to keep up and improve posterity. They are an important component of the social structure and the potential future careers of culture. Social justice, therefore, demands justice to children. The need for providing protection and safeguards to children have first been stated in the Geneva Declaration of the Rights of the Child, 1924 and was recognised in the Universal Declaration of Human Rights, 1948 and in the Statutes of specialised agencies of U.N.O. Art. 25 of the Universal Declaration of Human Rights, 1948 provides that "*motherhood and childhood are entitled to special care and assistance*. All children, whether born in or out of wedlock, shall enjoy the same social protection". Rights to free and compulsory elementary education to children is assured by Article 26.

The Declaration of the Rights of Child, 1959

A concrete step has been taken through the *Declaration of the Rights of the child in 1959* which aims that the child may have a happy childhood and enjoy for his own good and for the good of the society, the rights set forth in the Declaration. The Preamble of the Declaration expresses concern of the International Community for child welfare. The child by reason of his physical and mental immaturity, needs special safeguards and care. It also calls upon parents, upon men and women as individuals, and upon voluntary organisations, local authorities and national Governments to recognise children rights and strive for their observance by legislative and other measures. These rights which the General Assembly of the United Nations calls upon to be recognised and implemented by the National Governments are contained in the following Ten Principles of the Declaration,

(1) The child shall enjoy and shall be entitled to the rights set forth in these principles without any distinction or descrimination. (2) It also ensures special protection and facilities for proper and integrated development of human personality. (3) The child shall be entitled from his birth to a name and nationality. (4) Special care and protection shall be provided to the child and his mother so that the child can grow and develop in health. For this purpose he shall have right to adequate nutrition, housing, recreation and medical services. (5) A child handicapped in any manner deserves special treatment, education and care suiting to his condition. (6) For proper development of his personality a child shall be ensured of love, atmosphere of affection and material security. (7) The child shall also be entitled to free and compulsory education to promote his general culture and enable him to develop his abilities on a basis of equal opportunity. (8) The child shall in all circumstances be among the first to receive protection and relief. (9) He shall be protected against all forms of neglect, cruelty and exploitation. He shall not be subjected to traffic in any form and shall not be admitted to employment before an appropriate age. He shall not be engaged in any employment which would prejudice his health or education or interfere with his physical, mental or moral development. (10) The child shall also be protected from practices which may foster racial, religious and any other form of discrimination.

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International Convention on the Rights of Child, 1989

A great headway had been made in the year 1989, which marked the 30th Anniversary of the 1959 Declaration of the Rights of the Child and the 10th Anniversary of the international year of the child, when on 20th November the General Assembly adopted an international convention on the rights of child, which was termed by the General Assembly President Joseph N. Garba as a binding piece of international legislation. The convention needs to be ratified by 20 countries before it comes into force. Prior to being placed before the assembly the draft of the Convention was approved by the Economic and Social Council and the commission on Human Rights during their sessions in 1989. The Preamble to the convention states that a child "needs special safeguards and care including appropriate legal protection before as well as after birth". Some of the main points of the convention are—

1. The convention defines a '*child*' as "every human being below the age of 18 years.

2. Every child has the inherent *right to life*, to a name, to acquire a nationality and, "as for as possible, the right to know and be cared for by his or her parents".

3. Children shall have the right to freedom of expression, thought, conscience and religion, association and peaceful assembly, education, rest and leisure, social security, the highest attainable standard of health" and a standard of living "adequate for his or her physical, mental, spiritual, moral and social development".

4. Children shall not be separated from their parents against their will. States parties will respect the responsibilities, rights and duties of parents, deal with family reunification "in a positive humane and expeditious manner", and combat the illicit transfer and non-return of children abroad.

5. Children shall be protected from economic exploitation and from hazardous work, drug use and trafficking, sexual exploitation and sexual abuse, and "all other forms of exploitation prejudicial to any aspects of the child welfare".

6. A minority or indigenous child shall not be denied the right to his or her own culture, religion or language.

7. A mentally or physically disabled child should enjoy a full and decent life.

8. A child who is capable of forming his or her own views should have the right to express those views freely in all matters affecting the child, including any judicial and administrative proceedings.

9. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Capital Punishment or life imprisonment shall not be enforced for offences committed by persons under 18 years.

10. States Parties will establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".

11. State Parties shall take "all feasible measures" so that children under 15 "do not take direct part in hostilities" and "shall refrain from recruiting" them into their armed forces.

12. The best interest of the child shall be "the paramount consideration" for adoption.

There are a total of 35 Articles in this convention and the above represent only some salient features of them. A committee on the Rights of the child, made up of 10 experts, is to be established to monitor compliance with convention provisions. It is heartening to note that the convention has been ratified by more than two third of the total members of the U.N.O. within a period of about half of the decade. The ratification requires a country to bring all its laws into line with the convention.

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Rights of Child and the Indian Constitution

The Indian Constitution was drafted almost at the same time when the "Universal

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Declaration of Human Rights" was adopted and the framers of the Indian constitution were influenced by the concept of human rights. The Indian constitution guarantees most of human rights which were later on embodied in the two Covenants in 1966.

Legally enforceable or justiciable rights are contained in Part III and non-justiciable rights are contained in part IV of the Indian constitution. Part IV of the constitution casts a duty upon the State to direct its policy towards securing inter-alia that the tender age of the children are not abused and that they are not forced by economic necessity to accept avocations unsuited to their age or strength.[1] The States shall also ensure appropriate opportunities to the children for proper development of their personality.[2] The State is further directed to provide for free and compulsory education for all children until the age of 14 years.[3]

The framers of the Indian Constitution thought it prudent to ensure at least the minimum rights to children which they considered essential for proper development of human personality and therefore children have been guaranteed certain fundamental rights. Article 23 of the constitution prohibits traffic in human being and begar and other similar forms of forced labour. 'Traffic in human beings' means selling and buying men and women like goods and includes immoral traffic in women and children for immoral or other purposes.[4] Article 23 protects the individual not only against the States but also against private citizens. Article 24 of the constitution prohibits employment of children below the age of 14 years in a factory or mine or other management in any other hazardous employment.

The idea of protecting the interest and promoting the welfare of the weaker sections of the society was so dominant in the mind of the Constitution framers that they excluded from the mischief of the equality clause enshrined in Article 15, the special provisions which the States may make for women and children.[5]

International standards regarding child labour have been prescribed by U.N. Covenants and Conventions and more detailed conventions have been adopted by the International labour Organisation. Steps have been taken to implement these conventions in our country through various labour Acts of Parliament, Acts of State Legislatures, Regulations made in pursuance to the statutes and memoranda of guidance addressed to local authorities and public agencies. All these contribute in some way in achieving the objective of providing social and economic justice to children of the society. There are a fairly large number of labour laws in our country and the Child Labour (Prohibition and Regulation) Act, 1986 is one of such important legislations.

PART I
PRELIMINARY

Section 1. Object and scope.—There are a number of enactments which prohibit, the employment of children below 14 years and 15 years of age in certain specified employments. However, there is no procedure laid down in any law for deciding in which employments, occupations or processes the employment of children should be banned. There is also no law to regulate the working conditions of children in most of the employments where they are not prohibited from working and are working under exploitative conditions. Therefore the Child Labour (Prohibitions and Regulation) Act, 1986 has been enacted to prohibit the engagement of children in certain employments and to regulate the conditions of work of children in certain other employments. This Act seeks to achieve the following objects :

1. Constitution of India, 1950, Article 39(e).
2. Id. Art. 39(f).
3. Id. Art. 45.
4. *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal 522.
5. Constitution of India, 1950, Article 15(3).

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(i) To ban the employment of children, *i.e.*, those who have not completed their fourteenth year, in specified occupations and processes ;

(ii) To lay down a procedure to decide modifications to the Schedule of banned occupations or processes ;

(iii) To regulate the conditions of work of children in employments where they are not prohibited from working ;

(iv) To lay down enhanced penalties for employment of children in violation of provisions of this Act, and other Acts which forbid the employment of children ;

(v) To obtain uniformity in the definition of "child" in the related laws.

In view of sub-section (2) of Section 1 this Act extends to the whole of India. Section 1(3) provides that the provisions of this Act other than Part III, shall come into force at once, and Part III shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different States and for different classes of establishments.

Section 2. Definitions.—In this Act, unless the context otherwise requires,—

(i) "appropriate Government" means in relation to an establishment under the control of the Central Government or a railway administration or a major port or a mine or oilfield, the Central Government, and in all other cases, the State Government ;

(ii) "child" means a person who has not completed his fourteenth year of age ;

(iii) "day" means a period of twenty-four hours beginning at midnight ;

(iv) "establishment" includes a shop, commercial establishment, workshop, farm, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment ;

(v) "family", in relation to an occupier, means the individual, the wife or husband, as the case may be, of such individual, and their children, brother or sister of such individual ;

(vi) "occupier", in relation to an establishment or a workshop, means the person who has the ultimate control over the affairs of the establishment or workshop ;

(vii) "port authority" means any authority administering a port ;

(viii) "prescribed" means prescribed by rules made under Section 18 ;

(ix) "week" means a period of seven days beginning at mid-night on Saturday night or such other night as may be approved in writing for a particular area by the Inspector ;

(x) "workshop" means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises to which the provisions of Section 67 of the Factories Act, 1948 (63 of 1948), for the time being, apply.

PART II
PROHIBITION OF EMPLOYMENT OF CHILDREN IN CERTAIN OCCUPATIONS AND PROCESSES

Section 3. Prohibition of employment of children in certain occupations and processes.—No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on :

Provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government.

Section 4. Power to amend the Schedule.—The Central Government, after giving by notification in the Official Gazette, not less than three months' notice of its intention so to do, may, by like notification, add any occupation or process to the

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Schedule and thereupon the Scheduled shall be deemed to have been amended accordingly.

Section 5. Child Labour Technical Advisory Committee.—(1) The Central Government may, by notification in the Official Gazette, constitute an advisory committee to be called the Child Labour Technical Advisory Committee (hereafter in this section referred to as the Committee) to advise the Central Government for the purpose of addition of occupations and processes to the Schedule.

(2) The Committee shall consist of a Chairman and such other members not exceeding ten, as may be appointed by the Central Government.

(3) The Committee shall meet as often as it may consider necessary and shall have power to regulate its own procedure.

(4) The committee may, if it deems it necessary so to do, constitute one or more sub-committees and may appoint to any such sub-committee, whether generally or for the consideration of any particular matter, any person who is not a member of the Committee.

(5) The term of office of, the manner of filling casual vacancies in the office of, and the allowances, if any, payable to, the Chairman and other members of the Committee, and the conditions and restrictions subject to which the Committee may appoint any person who is not a member of the Committee as a member of any of its sub-committees shall be such as may be prescribed.

PART III
REGULATION OF CONDITIONS OF WORK OF CHILDREN

Section 6. Application of Part.—The provisions of this Part shall apply to an establishment or a class of establishments in which none of the occupations or processes referred to in Section 3 is carried on.

Section 7. Hours and period of work.—(1) No child shall be required or permitted to work in any establishment in excess of such number of hours as may be prescribed for such establishment or class of establishments.

(2) The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour.

(3) The period of work of a child shall be so arranged that inclusive of his interval for rest, under sub-section (2), it shall not be spread over more than six hours, including the time spent in waiting for work on anyday.

(4) No child shall be permitted or required to work between 7 p.m. and 8 a.m.

(5) No child shall be required or permitted to work overtime.

(6) No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.

Section 8. Weekly holidays.—Every child employed in an establishment shall be allowed in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in three months.

Section 9. Notice to Inspector.—(1) Every occupier in relation to an establishment in which a child was employed or permitted to work immediately before the date of commencement of this Act in relation to such establishment shall, within a period of thirty days from such commencement, send to the Inspector within whose local limits the establishment is situated, a written notice containing the following particulars, namely :—

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(a) the name and situation of the establishment ;

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(b) the name of the person in actual management of the establishment ;

(c) the address to which communications relating to the establishment should be sent ; and

(d) the nature of the occupation or process carried on in the establishment.

(2) Every occupier, in relation to an establishment, who employs, or permits to work, any child after the date of commencement of this Act in relation to such establishment, shall, within a period of thirty days from the date of such employment, send to the Inspector within whose local limits the establishment is situated, a written notice containing the particulars as are mentioned in sub-section (1).

Explanation.—For the purposes of sub-sections (1) and (2), "date of commencement of this Act, in relation to an establishment" means the date of bringing into force of this Act in relation to such establishment.

(3) Nothing in Sections 7, 8 and 9 shall apply to any establishment wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government.

Section 10. Disputes as to age.—If any question arises between an Inspector and an occupier as to the age of any child who is employed or is permitted to work by him an establishment, the question shall, in the absence of a certificate as to the age of such child granted by the prescribed medical authority, be referred by the Inspector for decision to the prescribed medical authority.

Section 11. Maintenance of register.—There shall be maintained by every occupier in respect of children employed or permitted to work in any establishment, a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any such establishment, showing—

(a) the name and the date of birth of every child so employed or permitted to work ;

(b) hours and periods of work of any such child and the intervals of rest to which he is entitled ;

(c) the nature of work of any such child ; and

(d) such other particulars as may be prescribed.

Section 12. Display of notice containing abstract of Sections 3 and 14.—Every railway administration, every port authority and every occupier shall cause to be displayed in a conspicuous and accessible place at every station on its railway or within the limits of a port or at the place of work, as the case may be, a notice in the local language and in the English language containing an abstract of Sections 3 and 14.

Section 13. Health and safety.—(1) The appropriate Government may, by notification in the Official Gazette, make rules for the health and safety of the children employed or permitted to work in any establishment or class of establishments.

(2) Without prejudice to the generality of the foregoing provision, the said rules may provide for all or any of the following matters, namely :—

(a) cleanliness in the place of work and its freedom from nuisance ;

(b) disposal of wastes and effluents ;

(c) ventilation and temperature ;

(d) dust and fume ;

(e) artificial humidification ;

(f) lighting ;

(g) drinking water ;

(h) latrine and urinals ;

(i) spittoons ;

(j) fencing of machinery ;

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(k) work at or near machinery in motion ;

(l) employment of children on dangerous machines ;

(m) instructions, training and supervision in relation to employment of children on dangerous machines ;

(n) device for cutting off powers ;

(o) self-acting machines ;

(p) easing of new machinery ;

(q) floor, stairs and means of access ;

(r) pits, sumps, openings in floors, etc. ;

(s) excessive weights ;

(t) protection of eyes ;

(u) explosive or inflammable dust, gas, etc. ;

(v) precautions in case of fire ;

(w) maintenance of buildings ; and

(x) safety of buildings and machinery.

PART IV
MISCELLANEOUS

Section 14. Penalties.—(1) Whoever employees any child or permits any child to work in contravention of the provisions of Section 3 shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.

(2) Whoever, having been convicted of an offence under Section 3, commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years.

(3) Whoever—

(a) fails to give notice as required by Section 9, or

(b) fails to maintain a register as required by Section 11 or makes any false entry in any such register ; or

(c) fails to display a notice containing an abstract of Section 3 and this section as required by Section 12 ; or

(d) fails to comply with or contravenes any other provisions of this Act or the rules made thereunder,

shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to ten thousand rupees or with both.

Section 15. Modified application of certain laws in relation to penalties.—(1) Where any person is found guilty and convicted of contravention of any of the provisions mentioned in sub-section (2), he shall be liable to penalties as provided in sub-section (1) and (2) of Section 14 of this Act and not under the Acts in which those provisions are contained.

(2) The provisions referred to in sub-section (1) are the provisions mentioned below :—

(a) Section 67 of the Factories Act, 1948 (63 of 1948) ;

(b) Section 40 of the Mines Act, 1952 (35 of 1952) ;

(c) Section 109 of the Merchant Shipping Act, 1958 (44 of 1958) ; and

(d) Section 21 of the Motor Transport Workers Act, 1961 (27 of 1961).

Section 16. Procedure relating to offences.—(1) Any person, police officer or Inspector may file a complaint of the commission of an offence under this Act in any court of competent jurisdiction.

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(2) Every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.

(3) No court inferior to that of a Metropolitan Magistrate or a Magistrate of the first class shall try any offence under this Act.

Meaning of complaint.—The word 'complaint' as used in this section has a wide meaning since it includes even an oral allegation. No particular form of complaint is prescribed. But a complaint must be an allegation *prima facie* disclosing the necessary facts that are necessary to constitute the offence alleged. It is on the basis of these facts that the Magistrate takes action.[1]

Section 17. Appointment of inspectors.—The appropriate Government may appoint Inspectors for the purposes of securing compliance with the provisions of this Act and any Inspector so appointed shall be deemed to be a public servant within the meaning of the Indian Penal Code (45 of 1860).

Section 18. Power to make rules.—(1) The appropriate Government may, by notification in the Official Gazette and subject to the condition of previous publication, make rules for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the term of office of, the manner of filing casual vacancies of, and the allowance payable to, the Chairman and members of the Child Labour Technical Advisory Committee and the conditions and restrictions subject to which a non-member may be appointed to a sub-committee under sub-section (5) of Section 5 ;

(b) number of hours for which a child may be required or permitted to work under sub-section (1) of Section 7 ;

(c) grant of certificates of age in respect of young persons in employment or seeking employment, the medical authorities which may issue such certificate, the form of such certificate, the charges which may be made thereunder and the manner in which such certificate may be issued :

Provided that no charge shall be made for the issue of any such certificate if the application is accompanied by evidence of age deemed satisfactory by the authority concerned ;

(d) the other particulars which a register maintained under Section 11 should contain.

Section 19. Rules and notifications to be laid before the Parliament or State legislature.—(1) Every rule made under this Act by the Central Government and every notification issued under Section 4, shall be laid, as soon as may be after it is made or issued, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made or issued, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

(2) Every rule made by a State Government under this Act shall be laid as soon as may be after it is made, before the legislature of that State.

Section 19 deals with the effect of failure to place the rules before houses of

1. (1970) 1 SCC 665.

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Parliament. In *Jan Mohan* v. *State of Gujarat*,[1] the validity of the rules framed was challenged on the ground that the rules were not placed before the Legislature at its first session and as such they were not valid, it was held that the rules were valid from the date on which they were made and failure to place them before the Houses of Legislature did not affect the validity of the rules.

Section 20. Certain other provisions of law not barred.—Subject to the provisions contained in Section 15, the provisions of this Act and the rules made thereunder shall be in addition to, and not in derogation of, the provisions of the Factories Act, 1948 (63 of 1948), the Plantations Labour Act, 1951 (69 of 1951), and the Mines Act, 1952 (35 of 1952).

Section 21. Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removal of the difficulty :

Provided that no such order shall be made after the expiry of a period of three years from the date on which this Act receives the assent of the President.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before the Houses of Parliament.

Section 22. Repeal and savings.—(1) The Employment of Children Act, 1938 (26 of 1938), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken or purported to have been done or taken under the Act so repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

When an Act is repealed, it is the same thing as if it had never existed except with reference to such parts as are saved by the repealing statute. *Waheed Hasan Khan* v. *State*, AIR 1960 Bom 299.

Section 23. Amendment of Act 11 of 1948.—In Section 2 of the Minimum Wages Act, 1948,—

(i) for clause (a), the following clauses shall be *substituted*, namely :—

"(a) 'adolescent' means a person who has completed his fourteenth year of age but has not completed his eighteenth year ;

(aa) 'adult' means a person who has completed his eighteenth year of age ;" ;

(ii) after clause (b), the following clause shall be *inserted*, namely :—

"(bb) 'child' means a person who has not completed his fourteenth year of age" ;

Section 24. Amendment of Act 69 of 1951.—In the Plantations Labour Act, 1951,—

(a) in Section 2, in clauses (a) and (c), for the word "fifteenth", the word "fourteenth" shall be *substituted* ;

(b) Section 24 shall be *omitted* ;

(c) in Section 26, in the opening portion, the words "who has completed his twelfth year" shall be *omitted*.

Section 25. Amendment of Act 44 of 1958.—In the Merchant Shipping Act, 1958, in Section 109, for the word "fifteen", the word "fourteen" shall be *substituted*.

Section 26. Amendment of Act 27 of 1961.—In the Motor Transport Workers Act, 1961, in Section 2, in clauses (a) and (c), for the word "fifteenth", the word "fourteenth" shall be *substituted*.

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1. AIR 1966 SC 385.

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[THE] CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

CHAPTER I
PRELIMINARY

Object and Scope.—The system of employment of contract labour lends itself to various abuses. The question of its abolition has been under the consideration of Government for a long time. In the second-five year plan, the Planning Commission made certain recommendations, namely, undertaking of studies to ascertain the extent of the porblem of contract labour, progressive abolition of system and improvement of service conditions of contract labour where the abolition was not possible. The matter was discussed at various meetings of Tripartite Committees at which the State Governments were also represented and general consensus of opinion was that the system should be abolished wherever possible or practicable and that in cases where this system could not be abolished altogether, the working conditions of contract labour should be regulated so as to ensure payment of wages and provision of essential amenities.

This Act aims at abolition of contract labour in respect of such categories as may be notified by appropriate Government in the light of certain criteria that have been laid down, and at regulating the service conditions of contract labour where abolition is not possible. It provides for the setting up of Advisory Boards of a tripartite character, representing various interests, to advise Central and State Governments in administering the legislation and registration of establishments and contractors. Under the Scheme of the Act, the provision and maintenance of certain basic welfare amenities for contract labour, like drinking water and first-aid facilities, and in certain cases rest-rooms and canteens, have been made obligatory. Provisions have also been made to guard against delays in the matter of wage payment. The Act was enacted in 1970 and has come into force with effect from 1st February, 1971. It extends to the whole of India.

Section 1(3) provides that the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act. According to sub-section 4 of Section 1 it applies—

(*a*) to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour ;

(*b*) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen :

Provided that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification.

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Section 1(5) provides that :

(*a*) The Act shall not apply to establishments in which work only of an intermittent or casual nature is performed.

(*b*) If a question arises whether work performed in an establishment is of an intermittent or casual nature, the appropriate Government shall decide that question after consultation with the Central Board or, as the case may be, a State Board, and its decision shall be final.

Explanation.—For the purpose of this sub-section, work performed in an establishment shall not be deemed to be of an intermittent nature—

(*i*) if it was performed for more than one hundred and twenty days in the preceding twelve months, or

(*ii*) if it is of a seasonal character and is performed for more than sixty days in a year.

2. Definitions.—(1) In this Act, unless the context otherwise requires,—

(*a*) "appropriate Government" means,—

(*i*) in relation to an establishment in respect of which the appropriate Government under the Industrial Disputes Act, 1947 (14 of 1947), is the Central Government ;

(*ii*) in relation to any other establishment, the Government of the State in which that other establishment is situated.

In *F.C.I. Class IV Employees Union* v. *F.C.I.*[1], the question was whether Food Corporation of India is entitled to employ a watchman as contract labour or not. The Government of India issued a notification dated December 9, 1976 prohibiting employment of Contract labour with effect from March 1, 1977. The question was whether Central Government or the State Government was the appropriate Government in respect of establishments of Food Corporation of India. It was held that the Act was amended in 1986 whereby it was provided that the Appropriate Government means the Central Government in relation to an establishment in respect of which the appropriate Government under the Industrial Disputes Act, 1947, is the Central Government. The amendment will apply only prospectively from the date of its publication and not retrospectively. Since at the time of issue of notification (i.e., 1976) the Central Government was not the appropriate Government in respect of establishments of Food Corporation of India in the State of Punjab, therefore the operation of the notification can not automatically be extended to the establishments of Food Corporation of India in the State of Punjab.

Air India has been established under the provisions of the Air Corporation Act, 1953. Large scale financial assistance is given to Air India by the Central Government. Air India is controlled by the Central Government. Corporation is an agency of the Central Government. Therefore the appropriate Government in respect of the Corporation is the Central Government.[2]

(*b*) a workman shall be deemed to be employed as "*contract labour*" in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer.

(*c*) "*contractor*", in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment

1. (1994) 2 LLJ 102 (P & H).
2. *United Labour Union and others* v. *Union of India & others*, (1991) I LLJ 89 (Bom).

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and includes a sub-contractor.

(*d*) "*controlled industry*" means any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest.

(*e*) "*establishment*" means—

(*i*) any office or department of the Government or a local authority, or

(*ii*) any place where any industry, trade, business, manufacture or occupation is carried on.

It was held in *Poona Cantonment Board* v. *S. K. Das and others*,[1] that the 'establishment' contemplated under the Contract Labour (Regulation and Abolition) Act, 1970 could be an establishment of a local authority. Since it is not disputed that the Pune Cantonment Board is a local authority therefore the Board would be an establishment within the meaning of Section 2(1)(e) of the said Act.

The definiton of 'establishment' in Section 2(1)(e) of the Act cannot include within its fold residential quarters. Hence employment of contract labour in the residential quarters of Bank would not amount to an offence under Section 10 of the Act.[2]

(*f*) "*prescribed*" means prescribed by rules made under this Act.

(*g*) "*principal employer*" means—

(*i*) in relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in this behalf,

(*ii*) in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named,

(*iii*) in a mine, the owner or agent of the mine and where a person has been named as the manager of the mine, the person so named,

(*iv*) in any other establishment, any person responsible for the supervision and control of the establishment.

Explanation.—For the purpose of sub-clause (*iii*) of this clause, the expressions "mine", "owner" and "agent" shall have the meanings respectively assigned to them in clause (*j*), clause (*l*) and clause (*c*) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952).

In *National Airport, Delhi* v. *Bangalore Airport Service Co-op. Society and others*,[3] the question was whether porters in airport engaged through a contractor were employees of the Airport and the Aerodrome officer was principal employer or not. It was held that in order to determine whether there was relationship of employer and employee two questions have to be decided. First whether there was a contract of employment between the applicants and the appellants even though indirectly. Secondly, whether the porterage service was incidental or integral part of the functions of the airport authorities. It was pointed out by the Court that the Labour Court and the learned single judge committed an error to arrive at a conclusion that there was relationship of employer and employee merely because the appellants had a little control over the activity and attitude of the applicants while discharging their duties of porterage service without noticing that mere exercise of control is not sufficient to hold that the authority so exercising the control is the principal employer without noticing from where that part of control emerges. So also, the power to suspend or to recommend to remove from

1. (1993) 2 LLJ 487 (Bom).
2. *Pawar* v. *Labour Enforcement Officer*, (6) (1993) 1 LLJ 521 (Kerala).
3. (1992) 2 LLJ 534 (Karn).

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service is also not an important factor. The test of control may be a relevant factor but it is not the decisive factor in master servant relationship in all cases. Hence the aerodrome officer was not a principal employer.

(*h*) "*wages*" shall have the meaning assigned to it in clause (*vi*) of section 2 of the Payment of Wages Act, 1936 (4 of 1936).

(*i*) "*workman*" means any person employed in or in connection with the work of any establishment to do any skilled, semi-skilled or un-skilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied but does not include any such person—

(*A*) who is employed mainly in a managerial or administrative capacity ; or

(*B*) who, being employed in a supervisory capacity draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature ; or

(*C*) who is an out-worker, that is to say, a person to whom any articles or materials are given out by or on behalf of the principal employer to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of the principal employer and the process is to be carried out either in the home of the out-worker or in some other premises, not being premises under the control and management, of the principal employer.

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(2) Any reference in this Act to a law which is not in force in the State of Jammu and Kashmir shall, in relation to that State, be construed as a reference to the corresponding law, if any, in force in that State.

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CHAPTER II
THE ADVISORY BOARDS

3. Central Advisory Board.—(1) The Central Government shall, as soon as may be, constitute a board to be called the Central Advisory Contract Labour Board (hereinafter referred to as the Central Board) to advise the Central Government on such matters arising out of the administration of this Act as may be referred to it and to carry out other functions assigned to it under this Act.

(2) The Central Board shall consist of—

(*a*) a Chairman to be appointed by the Central Government ;

(*b*) the Chief Labour Commissioner (Central) *ex officio* ;

(*c*) such number of members, not exceeding seventeen but not less than eleven, as the Central Government may nominate to represent that Government, the Railways, the coal industry, the mining industry, the contractors, the workmen and any other interests which, in the opinion of the Central Government, ought to be represented on the Central Board.

(3) The number of persons to be appointed as members from each of the categories specified in sub-section (2), the term of office and other conditions of service of, the procedure to be followed in the discharge of their functions by, and the manner of filling vacancies among the members of the Central Board shall be such as may be prescribed :

Provided that the number of members nominated to represent the workmen shall not be less than the number of members nominated to represent the principal employers and the contractors.

4. State Advisory Board.—(1) The State Government may constitute a board to be called the State Advisory Contract Labour Board (hereinafter referred to as the State Board) to advise the State Government on such matters arising out of the administration of this Act as may be referred to it and to carry out other functions assigned to it under this Act.

(2) The State Board shall consist of—

(*a*) a Chairman to be appointed by the State Government ;

(*b*) the Labour Commissioner, *ex officio*, or in his absence any other officer nominated by the State Government in that behalf ;

(*c*) such number of members, not exceeding eleven but not less than nine, as the State Government may nominate to represent that Government, the industry, the contractors, the workmen and any other interests which, in the opinion of the State Government, ought to be represented on the State Board.

(3) The number of persons to be appointed as members from each of the categories specified in sub-section (2), the term of office and other conditions of service of, the procedure to be followed in the discharge of their functions by, and the manner of filling vacancies among the members of the State Board shall be such as may be prescribed :

Provided that the number of members nominated to represent the workmen shall not be less than the number of members nominated to represent the principal employers and the contractors.

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5. Power to constitute committees.—(1) The Central Board or the State Board, as the case may be, may constitute such committees and for such purpose or purposes as it may think fit.

(2) The committee constituted under sub-section (1) shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be prescribed.

(3) The members of a committee shall be paid such fees and allowances for attending its meetings as may be prescribed :

Provided that no fees shall be payable to a member who is an officer of Government or of any corporation established by any law for the time being in force.

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CHAPTER III
REGISTRATION OF ESTABLISHMENTS EMPLOYING CONTRACT LABOUR

6. Appointment of registering officers.—The appropriate Government may, by an order notified in the Official Gazette—

(*a*) appoint such persons, being Gazetted Officers of Government, as it thinks fit to be registering officers for the purposes of this Chapter ; and

(*b*) define the limits, within which a registering officer shall exercise the powers conferred on him by or under this Act.

7. Registration of certain establishments.—(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in the prescribed manner for registration of the establishment :

Provided that the registering officer may entertain any such application for registration after expiry of the period fixed in this behalf, if the registering officer is satisfied that the applicant was prevented by sufficient cause from making the application in time.

(2) If the application for registration is complete in all respects, the registering officer shall register the establishment and issue to the principal employer of the establishment a certificate of registration containing such particulars as may be prescribed.

In *Food Corporation of India Worker's Union* v. *Food Corporation of India & others*[1] the Gujarat High Court held that under Section 7 of the Act, the principal employer is required to obtain a certificate of registration issued by the appropriate Government and under Section 12, the contractor is required to obtain a licence. The workmen can be employed as contract labour only through licensed contractor. Unless both the aforesaid conditions are complied with the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 would not be attracted. In a situation wherein either of these two conditions is not satisfied a workman employed by an intermediary would be deemed to have been employed by the principal employer. Therefore in relation to the period when either the principal employer did not possess the certificate of Registration or the contractor did not possess the licence, the workmen can claim that they are directly employed by the principal employer.

8. Revocation of registration in certain cases.—If the registering officer is satisfied, either on a reference made to him in this behalf or otherwise, that the registration of any establishment has been obtained by misrepresentation or suppression of any material fact, or that for any other reason the registration has become useless or ineffective and, therefore, requires to be revoked, the registering officer may, after giving an opportunity to the principal employer of the establishment to be heard and with the previous approval of the appropriate Government, revoke the registration.

9. Effect of non-registration.—No principal employer of an establishment, to which this Act applies, shall—

1. (1992) 1 LLJ 257 (Guj).

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(*a*) in the case of an establishment required to be registered under section 7, but which has not been registered within the time fixed for the purpose under that section,

(*b*) in the case of an establishment the registration in respect of which has been revoked under section 8,

employ contract labour in the establishment after the expiry of the period referred to in clause (a) or after the revocation of registration referred to in clause (b), as the case may be.

10. Prohibition of employment of contract labour.—(1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board, or as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

(2) Before issuing any notification under sub-section (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as,—

(*a*) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment ;

(*b*) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment ;

(*c*) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto ;

(*d*) whether it is sufficient to employ considerable number of whole-time workmen.

Explanation.—If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final.

Where the Contract Labour (Regulation and Abolition) Act applies to an establishment, it is for the appropriate Government under Section 10 to prohibit the employment of contract labour and no reference under Section 10 of the Industrial Disputes Act, 1947 can be sought for absorption of contract labour by principal employer and for payment of all benefits available to the permanent employees of principal employer.[1]

It was held in *Powar* v. *Labour Enforcement Officer (C)*[2] that the notification issued under the Act cannot go beyond the scope of Section 10(1). This sub-section specially prohibits employment of contract labour in any process, operation or other work in any establishment and it cannot include any work connected with the establishment. The prohibition envisaged under Section 10(1) is not attracted to employment of contract labour in the residential quarters of the Bank.

It was held in *Gammon India Ltd.* v. *Union of India*[3], that the words 'other work in any establishment' in Section 10 are to be construed as *ejusdem generis*. The expression 'other work' in the collocation of words 'process, operation or other work in any establishment' occuring in Section 10 has not the same meaning as the expression 'in connection with the work of an establishment', spoken in relation to workmen or contract.

1. *Philips Workers Union, Thane* v. *State of Maharashtra and another*, (1987) 2 LLJ 91 (Bom).
2. (1993) 1 LLJ 521 (Kerala).
3. (1974) 1 LLJ 489 (SC).

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It was held in *M/s. Zenith Industrial Services and others* v. *Union of India and others*[1] that a general notification covering all limestone, dolomite and manganese mines throughout India prohibiting employment of contract labour was valid. It was not necessary to issue separate notification for each quarry. It was also held that the Central Government is bound to consult Central Advisory Board before issuing notification under Section 10. Such consultation is mandatory and is also a condition precedent.

It was held in *Tata Refractories Ltd. Belpahar & others* v. *Union of India*[2] that consultation with Central Advisory Board and taking into account the factors contained in sub-section (2) of Section 10 are mandatory before issuing notification abolishing contract labour. The Central Government should produce report of Advisory Board and satisfy the court that factors mentioned in clauses (a) to (d) of Section 10(2) were considered before issuing notification. A bare assertion in counter affidavit without any material in support of the same cannot be said to be sufficient to establish that the relevant factors contained in clauses (a) to (d) of Section 10(2) has been considered by the Committee constituted by the Advisory Board before submitting its report.

It was held in *Saurashtra Chemicals & Another* v. *State of Gujarat*[3] that Section 10(2) of the Act does not cast any obligation upon the Government to take decision to prohibit or abolish the contract labour system in all processes or works at a time. The Government may prohibit or abolish the contract labour system in some of the processes or works or operation at a particular stage and defer the prohibition or abolition at a different stage. It would all depend on the situation in the establishment concerned and the industry and the economy as a whole. There is no obligation on the Government to accept all the recommendations of the Advisory Committee at a time. All that is necessary for the Government is to consult the Advisory Board and take into consideration the factors mentioned in Section 10(2) of the Act.

In *Lalbavta Hotel & Bakery Mazdoor Union and another* v. *Bharat Petroleum Corpn. Ltd. & others*,[4] a canteen was run by a contractor and it was in operation round the clock and on all the days of the years. The Union filed a writ petition for a declaration that contract labours employed in the canteen of the Corporation refineries are regular employees of the Corporation. It was held that looking to the statutory guidelines prescribed in Section 10(2) of the Act, the work in the canteens being in discharge of statutory obligation under Section 46 of the Factories Act, 1948 is very much incidental to or connected with the work in the refinery. The facts also show that the canteen in the refinery has been running on all the days in a year from the day the refinery was established. It is therefore of a perennial nature. The work is full time, while work in the refinery canteen is carried out by engaging contract labour the same type of work is carried out in the marketing installations through departmentally employed labour. It is further seen that there is enough work to employ a large number of full time workmen. Thus all the considerations specified in clauses (a) to (d) of sub-section (2) of Section 10 of the Act are fulfilled. If there had been bona fide and careful application of mind to the factors contained in the guidelines specified under Section 10(2) of the Act and recommendation of the committee appointed by the Board, it would have been impossible for the Central Government to arrive at the conclusion that the contract labour should not be abolished in the refinery canteen. It is, however, unfortunate that there was no application of mind either to the statutory guidelines or to the committees recommendations and the decision is not arrived at fairly and justly. The Central Government chose not to act in accordance with law in the discharge of its

1. (1990) 1 LLJ 38 (Orissa).
2. (1992) 2 LLJ 810 (Orissa).
3. (1995) 2 LLJ 379 (Guj).
4. (1993) 2 LLJ 1179 (Bom).

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statutory functions and duty. Therefore the High Court could issue a direction with regard to abolition of contract labour in the canteen by issuing a writ of mandamus.

In *P. Karunakaran* v. *Chief Commercial Superintendent, Southern Railway and others*,[1] a licenced contractor was running a railway refreshment room in Southern Railway engaging contract labour. On the expiry of the licence period, the services of all the workmen stood terminated. It was held that the contractor himself has to vacate the premises and with him the entire establishment has to vacate on the expiry of the licence-period to pave the way for the new contractor to run the refreshment room. Under such circumstances the contract labourers cannot claim to be absorbed in railway service.

In *Catering-Cleaners of Southern Railway* v. *Union of India and others*,[2] Southern Railway engaged contract labour in catering establishment and in Pantry cars of long distance trains. Contract labour system in regard to catering cleaners was abolished in other Railways. Therefore a writ petition was filed in Supreme Court requesting to direct Central Government to issue notification abolishing the contract labour in respect of catering cleaners in Southern Railway and to absorb contract labour as employees of Railways. Such catering cleaners working under contractors were being paid less than the minimum wage. It was held that the court could issue a writ of mandamus directing the Government to exercise their power under section 10(1) of the Act and abolish the contract system if the Government fails or refuses to exercise its power. However in the present case the Government was only directed to take action under Section 10 of the Act within 6 months and the Railway administration was restrained from employing contract labour until the Central Government decides under Section 10 of the Act.

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1. (1989) 1 LLJ 8 (Kerala).
2. (1987) 1 LLJ 345 (SC).

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CHAPTER IV
LICENSING OF CONTRACTORS

11. Appointment of licensing officers.—The appropriate Government may, by an order notified in the Official Gazette,—

(*a*) appoint such persons, being Gazetted Officers of Government, as it thinks fit to be licensing officers for the purposes of this Chapter ; and

(*b*) define the limits, within which a licensing officer shall exercise the powers conferred on licensing officers by or under this Act.

12. Licensing of contractors.—(1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint, no contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer.

(2) Subject to the provisions of this Act, a licence under sub-section (1) may contain such conditions including, in particular, conditions as to hours of work, fixation of wages and other essential amenities in respect of contract as the appropriate Government may deem fit to impose in accordance with the rules, if any, made under section 35 and shall be issued on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed.

It was held in *General Labour Union (Red Flag)* v. *K.M. Desai and others*,[1] that there is no provision in the Contract Labour (Regulation and Abolition) Act, 1970 whereby it can be construed even by a remote possible way that in case of failure on the part of the contractor to register his contract under Section 12 of the Act, the employees employed by the contractor would become the direct employees of the company. Failure on the part of the contract to register the contractor would lead to invoking penal provisions.

However it was held in *United Labour Union and others* v. *Union of India and others*[2] that mere existence of penal provisions does not detract from the position that there can be no deemed contract labour if the two conditions relating to registration of the principal employer and obtaining of a valid licence by the contractor are not satisfied. If the protection or right given by reason of a deeming provision is not available, then the natural consequence must follow in addition to the penal consequences, unless there is provision to the contrary. There is no provision in the Act that the services of the workmen, *qua* the principal employer, stand terminated on the contract labour becoming invalid and/or abolished.

13. Grant of licences.—(1) Every application for the grant of a licence under sub-section (1) of section 12 shall be made in the prescribed form and shall contain the particulars regarding the location of the establishment, the nature of process, operation or work for which contract labour is to be employed and such other particulars as may be prescribed.

(2) The licensing officer may make such investigation in respect of the application received under sub-section (1) and in making any such investigation the licensing officer shall follow such procedure as may be prescribed.

1. (1990) 2 LLJ 259 (Bom).
2. (1991) 1 LLJ 89 (Bom).

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(3) A licence granted under this Chapter shall be valid for the period specified therein and may be renewed from time to time for such period and on payment of such fees and on such conditions as may be prescribed.

14. Revocation, suspension and amendment of licences.—(1) If the licensing officer is satisfied, either on a reference made to him in this behalf or otherwise, that—

(*a*) a licence granted under section 12 has been obtained by misrepresentation or suppression of any material fact, or

(*b*) the holder of a licence has, without reasonable cause, failed to comply with the conditions subject to which the licence has been granted or has contravened any of the provisions of this Act or the rules made thereunder,

then, without prejudice to any other penalty to which the holder of the licence may be liable under this Act, the licensing officer may, after giving the holder of the licence an opportunity of showing cause, revoke or suspend the licence or forfeit the sum, if any, or any portion thereof deposited as security for the due performance of the conditions subject to which the licence has been granted.

(2) Subject to any rules that may be made in this behalf, the licensing officer may vary or amend a licence granted under section 12.

15. Appeal.—(1) Any person aggrieved by an order made under section 7, section 8, section 12 or section 14 may, within thirty days from the date on which the order is communicated to him, prefer an appeal to an appellate officer who shall be a person nominated in this behalf by the appropriate Government :

Provided that the appellate officer may entertain the appeal after the expiry of the said period of thirty days, if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) On receipt of an appeal under sub-section (1), the appellate officer shall, after giving the appellant an opportunity of being heard dispose of the appeal as expeditiously as possible.

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CHAPTER V
WELFARE AND HEALTH OF CONTRACT LABOUR

16. Canteens.—(1) The appropriate Government may make rules requiring that in every establishment—

(*a*) to which this Act applies,

(*b*) wherein work requiring employment of contract of labour is likely to continue for such period as may be prescribed, and

(*c*) wherein contract labour numbering one hundred or more is ordinarily employed by a contractor,

one or more canteens shall be provided and maintained by the contractor for the use of such contract labour.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the date by which the canteens shall be provided ;

(*b*) the number of canteens that shall be provided, and the standards in respect of construction, accommodation, furniture and other equipment of the canteens ; and

(*c*) the foodstuffs which may be served therein and the charges which may be made therefor.

17. Rest-rooms.—(1) In every place wherein contract labour is required to halt at night in connection with the work of an establishment—

(*a*) to which this Act applies ; and

(*b*) in which work requiring employment of contract labour is likely to continue for such period as may be prescribed,

there shall be provided and maintained by the contractor for the use of the contract labour such number of rest-rooms or such other suitable alternative accommodation within such time as may be prescribed.

(2) The rest-rooms or the alternative accommodation to be provided under sub-section (1) shall be sufficiently lighted and ventilated and shall be maintained in a clean and comfortable condition.

18. Other facilities.—It shall be the duty of every contractor employing contract labour in connection with the work of an establishment to which the Act applies, to provide and maintain—

(*a*) a sufficient supply of wholesome drinking water for the contract labour at convenient places ;

(*b*) a sufficient number of latrines and urinals of the prescribed types so situated as to be convenient and accessible to the contract labour in the establishment ; and

(*c*) washing facilities.

19. First-aid facilities.—There shall be provided and maintained by the contractor so as to be readily accessible during all working hours a first-aid box equipped with the prescribed contents at every place where contract labour is employed by him.

20. Liability of principal employer in certain cases.—(1) If any amenity

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required to be provided under section 16, section 17, section 18 or section 19 for the benefit of the contract labour employed in an establishment is not provided by the contractor within the time prescribed therefor, such amenity shall be provided by the principal employer within such time as may be prescribed.

(2) All expenses incurred by the principal employer in providing the amenity may be recovered by the principal employer from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

21. Responsibility for payment of wages.—(1) A contractor shall be responsible for payment of wages to each worker employed by him as contract labour and such wages shall be paid before the expiry of such period as may be prescribed.

(2) Every principal employer shall nominate a representative duly authorised by him to be present at the time of disbursement of wages by the contractor and it shall be the duty of such representative to certify the amounts paid as wages in such manner as may be prescribed.

(3) It shall be the duty of the contractor to ensure the disbursement of wages in the presence of the authorised representative of the principal employer.

(4) In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

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CHAPTER VI
PENALTIES AND PROCEDURE

22. Obstructions.—(1) Whoever obstructs an inspector in the discharge of his duties under this Act or refuses or wilfully neglects to afford the inspector any reasonable facility for making any inspection, examination, inquiry or investigation authorised by or under this Act in relation to an establishment to which, or a contractor to whom, this Act shall apply, shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

(2) Whoever wilfully refuses to produce on the demand of an inspector any register or other document kept in pursuance of this Act or prevents or attempts to prevent or does anything which he has reason to believe is likely to prevent any person from appearing before or being examined by an inspector acting in pursuance of his duties under this Act, shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

23. Contravention of provisions regarding employment of contract labour.—Whoever contravenes any provision of this Act or of any rules made thereunder prohibiting, restricting or regulating the employment of contract labour, or contravenes any condition of a licence granted under this Act, shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both, and in the case of a continuing contravention with an additional fine which may extend to one hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

It was held in *Deva Nath & others* v. *National Fertilisers Ltd. & others*[1] that it is not for the High Court to inquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the Government after considering the matter as required to be considered under Section 10 of the Act. The only consequence provided in the Act where either the principal employer or the labour contractor violates the provisions of Section 9 and 12 respectively is the penal provision as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act. In a writ petition the High Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer.

It was held in *M/s. Indian Iron & Steel Co. Ltd. and others* v. *State of Bihar and others*[2] that violation of notification issued under sub-section (1) of Section 10 of the Act cannot attract the penal provisions of the Act. Remedy for violation of notification has to be sought in a different way. A statement as required under Section 25 should be made against the person against whom prosecution is launched. Non compliance with the requirement of Section 25 goes to the very root of the matter.

In *S.B. Deshmukh* v. *Labour Enforcement Officer*,[3] a complaint was filed under

1. (1992) 1 LLJ 289 (SC).
2. (1987) 2 LLJ 333 (Patna).
3. (1986) 2 LLJ 382 (Bom).

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Section 23 and 24 of the Contract Labour (Regulation and Abolition) Act, 1970 against the petitioner who was the Chief Regional Manager of State Bank of India and the contractor for supplying 12 persons as contract labour for maintenance, cleaning, dusting of building of Bank which was prohibited by notification issued by Central Government under Section 10(1) of the Act. It was held that the prohibition under Section 10 of the Act is not *qua* the establishment but it is *qua* a particular activity of contract labour. It prohibits the employment of contract labour in any process, operation or other work in any establishment. If at all there is any contravention, the same is done by the principal employer of the establishment. If the contractor had aided and abetted the employer in the commission of such offence then he ought to have been prosecuted on those allegations.

24. Other offences.—If any person contravenes any of the provisions of this Act or of any rules made thereunder for which no other penalty is elsewhere provided, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

In *Basanta Kumar Mohanty* v. *State of Orissa*,[1] the petitioner was the Director in charge of Security and Detective Services (India) Limitd. It was alleged that the petitioner entered into an agreement with Talcher Thermal Power Station Expansion Division for engagement of Security guards. These guards were contract labour and therefore the petitioner was required to take licence as contractor. It was held that the engagement of Security Guards was not in or in connection with any work of any particular establishment. Merely because a contractor undertakes to render any particular service and engage its employees, it does not *ipso facto* lead to engagement of contract labour, unless persons who are engaged were hired for any particular job. The prosecution has failed to establish that the contractor hired any particular person for engagement with the principal employer's work. Therefore conviction of the petitioner under Section 24 of the Act cannot be maintained.

25. Offences by companies.—(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any neglect on the part of any director, manager, managing agent or any other officer of the company, such director, manager, managing agent or such other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

(*a*) "company" means any body corporate and includes a firm or other association of individuals ; and

(*b*) "director", in relation to a firm, means a partner in the firm.

In *Lift Engineering Services Pvt. Ltd. & Another* v. *P.K. Bhattacharyay & Another*[2]

1. (1992) 2 LLJ 190 (Orissa).
2. (1995) 2 LLJ 246 (Cal).

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no allegation in the complaint was made that the Director of the company has been incharge of and responsible to the company for the conduct of its business at the time of commission of the alleged offence. It was therefore, held that no criminal proceedings can be initiated against the Director of a Private Limited Company.

26. Cognizance of offences.—No Court shall take cognizance of any offence under this Act except on a complaint made by, or with the previous sanction in writing of, the inspector and no Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

27. Limitation of prosecutions.—No Court shall take cognizance of an offence punishable under this Act unless the complaint thereof is made within three months from the date on which the alleged commission of the offence came to the knowledge of an inspector :

Provided that where the offence consists of disobeying a written order made by an inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.

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CHAPTER VII
MISCELLANEOUS

28. Inspecting staff.—(1) The appropriate Government may, by notification in the Official Gazette, appoint such persons as it thinks fit to be inspectors for the purposes of this Act, and define the local limits within which they shall exercise their powers under this Act.

(2) Subject to any rules made in this behalf, an inspector may, within the local limits for which he is appointed—

(*a*) enter, at all reasonable hours, with such assistance (if any), being persons in the service of the Government or any local or other public authority as he thinks fit, any premises or place where contract labour is employed, for the purpose of examining any register or record or notices required to be kept or exhibited by or under this Act or rules made thereunder, and require the production thereof for inspection ;

(*b*) examine any person whom he finds in any such premises or place and who, he has reasonable cause to believe, is a workman employed therein ;

(*c*) require any person giving out work and any workman, to give any information, which is in his power to give with respect to the names and addresses of the person to, for and from whom the work is given out or received, and with respect to the payments to be made for the work ;

(*d*) seize or take copies of such register, record of wages or notices or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by the principal employer or contractor ; and

(*e*) exercise such other powers as may be prescribed.

(3) Any person required to produce any document or thing or to give any information required by an inspector under sub-section (2) shall be deemed to be legally bound to do so within the meaning of section 175 and section 176 of the Indian Penal Code (45 of 1860).

(4) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898), shall, so far as may be, apply to any search or seizure under sub-section (2) as they apply to any search or seizure made under the authority of a warrant issued under section 98 of the said Code.[1]

29. Registers and other records to be maintained.—(1) Every principal employer and every contractor shall maintain such registers and records giving such particulars of contract labour employed, the nature of work performed by the contract labour, the rates of wages paid to the contract labour and such other particulars in such form as may be prescribed.

(2) Every principal employer and every contractor shall keep exhibited in such manner as may be prescribed within the premises of the establishment where the contract labour is employed, notices in the prescribed form containing particulars about the hours of work, nature of duty and such other information as may be prescribed.

30. Effect of laws and agreements inconsistent with this Act.—(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith

1. Now see Section 94, Code of Criminal Procedure, 1973.

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contained in any other law or in the terms of any agreement or contract of service, or in any standing orders applicable to the establishment whether made before or after the commencement of this Act :

Provided that where under any such agreement, contract of service or standing orders the contract labour employed in the establishment are entitled to benefits in respect of any matter which are more favourable to them than those to which they would be entitled under this Act, the contract labour shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that they receive benefits in respect of other matters under this Act.

(2) Nothing contained in this Act shall be construed as precluding any such contract labour from entering into an agreement with the principal employer or the contractor, as the case may be, for granting them rights or privileges in respect of any matter which are more favourable to them than those to which they would be entitled under this Act.

31. Power to exempt in special cases.—The appropriate Government may, in the case of an emergency, direct, by notification in the Official Gazette, that subject to such conditions and restrictions, if any, and for such period or periods, as may be specified in the notification, all or any of the provisions of this Act or the rules made thereunder shall not apply to any establishment or class of establishments or any class of contractors.

32. Protection of action taken under this Act.—(1) No suit, prosecution or other legal proceedings shall lie against any registering officer, licensing officer or any other Government servant or against any member of the Central Board or the State Board, as the case may be, for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.

(2) No suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.

33. Power to give directions.—The Central Government may give directions to the Government of any State as to the carrying into execution in the State of the provisions contained in this Act.

34. Power to remove difficulties.—If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as appears to it to be necessary or expedient for removing the difficulty.

35. Power to make rules.—(1) The appropriate Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(*a*) the number of persons to be appointed as members representing various interests on the Central Board and the State Board, the term of their office and other conditions of service, the procedure to be followed in the discharge of their functions and the manner of filling vacancies ;

(*b*) the times and places of the meetings of any committee constituted under this Act, the procedure to be followed at such meetings including the quorum necessary for the transaction of business, and the fees and allowances that may be paid to the members of a committee ;

(*c*) the manner in which establishments may be registered under section 7, the levy of a fee therefor and the form of certificate of registration ;

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(*d*) the form of application for the grant or renewal of a licence under section 13 and the particulars it may contain ;

(*e*) the manner in which an investigation is to be made in respect of an application for the grant of a licence and the matters to be taken into account in granting or refusing a licence ;

(*f*) the form of a licence which may be granted or renewed under section 12 and the conditions subject to which the licence may be granted or renewed, the fees to be levied for the grant or renewal of a licence and the deposit of any sum as security for the performance of such conditions ;

(*g*) the circumstances under which licences may be varied or amended under section 14 ;

(*h*) the form and manner in which appeals may be filed under section 15 and the procedure to be followed by appellate officers in disposing of the appeals ;

(*i*) the time within which facilities required by this Act to be provided and maintained may be so provided by the contractor and in case of default on the part of the contractor, by the principal employer ;

(*j*) the number and types of canteens, rest-rooms, latrines and urinals that should be provided and maintained ;

(*k*) the type of equipment that should be provided in the first-aid boxes ;

(*l*) the period within which wages payable to contract labour should be paid by the contractor under sub-section (1) of section 21 ;

(*m*) the form of registers and records to be maintained by principal employers and contractors ;

(*n*) the submission of returns, forms in which, and the authorities to which, such returns may be submitted ;

(*o*) the collection of any information or statistics in relation to contract labour ; and

(*p*) any other matter which has to be, or may be, prescribed under this Act.

(3) Every rule made by the Central Government under this Act shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however, that any such modification or annulment, shall be without prejudice to the validity of anything previously done under that rule.

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[THE] EQUAL REMUNERATION ACT, 1976

CHAPTER I
PRELIMINARY

Introduction.—The principle of equal pay for equal work is contained in Clause (d) of Article 39 of the Indian Constitution which envisages that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. This principle implies that where all things are equal, that is, where all relevant considerations are the same, persons holding identical posts may not be treated differentaly in the matter of their pay merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely because the posts are of the same rank and the nomenclature is the same.[1] In *Randhir Singh* v. *Union of India*[2] the Supreme Court held that the principle of equal pay for equal work though not a fundamental right is certainly a constitutional goal and therefore capable of enforcement through constitutional remedies under Article 32 of the Constitution. The doctrine of equal pay for equal work is applicable to persons employed on a daily wage basis. Daily wagers are entitled to the same wages as other permanent employees in the department employed to do the identical work.[3]

Equal pay for equal work finds its place in the Directive Principles of State Policy and it is an accompaniment of equality clause enshrined in Articles 14 and 16 of the Constitution of India. Nevertheless the abstract doctrine of equal pay for equal work cannot be read in Article 14. Reasonable classification based on intelligible criteria, having nexus to the object sought to be achieved, is permissible.[4] Accordingly it has been held in *State of A.P. and others* v. *G. Sreenivasa Rao & others*,[5] that "equal pay for equal work" does not mean that all the members of a cadre must receive the same pay packet, irrespective of their seniority, source of recruitment, educational qualifications and various other incidents of service. It was further held that ordinarily grant of higher pay to a junior would *ex-facie* be arbitrary, but the equality doctrine cannot be invoked where there are justifiable grounds in doing so. For example when persons recruited from different sources are given pay protection, when a promotee from a lower cadre or a transferee from another cadre is given pay protection, when a senior is stopped at efficiency bar, when advance increments are given for experience, passing a test, acquiring higher qualification or as incentive for efficiency are some of the eventualities when a junior may be drawing higher pay than his senior without violating the mandate of equal pay for equal work.

In *State of West Bengal and others* v. *Hari Narayan Bhowal and others*[6] the

1. *Randhir Singh* v. *Union of India*, (1982) LLJ 344.
2. *Ibid.*
3. *Surinder Singh* v. *Engineer-in-chief C.P.W.D.* AIR 1986 SC 534.
4. *State of A.P. and others* v. *G. Sreenivasa Rao & others*, (1989) 2 LLJ 149 (SC).
5. (1989) 2 LLJ 149 (SC).
6. (1995) 2 LLJ 328 (SC).

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Supreme Court has held that unless a very clear case is made out and court is satisfied that the scale povided to a group of persons on the basis of the material produced before it amounts to discrimination without there being any justification, the court should not take upon itself the responsibility of fixation of scales of pay, especially when the different scale of pay have been fixed by Pay Commission or Pay Revision Committees, having persons as members who can be held to be experts in the field and after examining all the relevant material. Till the claimants satisfy on material produced, that they have not been treated as equals within the parameters of Article 14, courts should be reluctant to issue any writ or direction to treat them equal, particularly, where a body of experts has found them not to be equal.

With a view to give effect to the goal of equal pay for equal work set out in clause (d) of Article 39 of the Constitution the President of India promulgated on 26th September, 1975, the Equal Remuneration Ordinance, 1975 so that the above Directive Principle could be implemented in the year which was being celebrated as the International Women's year. The above Ordinance was later converted into an Act as Act No. 25 of 1976. The Equal Remuneration Act, 1976 provides for the payment of equal remuneration to men and women workers and for prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected there with or incidental thereto. The Act ensures against discrimination in recruitment and promotion of men and women. It provides for the setting up of Advisory Committees to promote employment opportunities for women. The Act extends to the whole of India. Sub-section (3) of Section 1 provides that the Act shall come into force on such date, not being later than three years from the passing of the Act, as the Central Government may, by notification, appoint and different dates may be appointed for different establishments or employments.

It was held in *Dharwad District P.W.D. Literate Daily Wage Employees Association & others* v. *State of Karnataka & Another*,[1] that the Equal Remuneration Act, 1976 was enacted for providing equality of pay for equal work between men and women which is a part of the principle 'equal pay for equal work'. The daily rated and monthly rated employees in the State of Karnataka are, therefore, entitled to pay like regular employees. Therefore the Government must pay salary to such workmen at the rates equivalent to the minimum pay in the pay scale of the regularly employed workers.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "appropriate Government" means,—

(i) in relation to any employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a banking company, a mine, oilfield or major port or any corporation established by or under a Central Act, the Central Government, and

(ii) in relation to any other employment, the State Government.

(b) "commencement of this Act" means, in relation to an establishment or employment, the date on which this Act comes into force in respect of that establishment or employment.

(c) "employer" has the meaning assigned to it in clause (f) of section 2 of the Payment of Gratuity Act, 1972 (39 of 1972).

(d) "man" and "woman" mean male and female human beings, respectively, of any age.

(e) "notification" means a notification published in the Official Gazette.

(f) "prescribed" means prescribed by rules made under this Act.

(g) "remuneration" means the basic wage or salary, and any additional

1. (1991) 2 LLJ 318 (SC).

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emoluments whatsoever payable, either in cash or in kind, to a person employed in respect of employment or work done in such employment, if the terms of the contract of employment, express or implied, were fulfilled.

(h) "same work or work of a similar nature" means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment.

In *State of M.P. & Another* v. *Pramod Bhartiya and others*,[1] the respondents are lecturers working in High Secondary Schools in the State of Madhya Pradesh. Conditions of their service are governed by Madhya Pradesh Non-gazetted class-III Educational Service (Non-Collegiate Branch Service) Recruitment and Promotion Rules, 1973. In the State of Madhya Pradesh there is another set of schools called 'Technical Schools'. These are also Higher Secondary Schools and in these lecturers are categorised as technical lecturers and non-technical lecturers. The conditions of service of lecturers in these schools are governed by M.P. Education Department (Technical) class III (Non-Ministerial) Recruitment Rules, 1980. It was held that it is not enough to say that the qualifications are the same, nor is it enough to say that the schools are of the same status. It is also not sufficient to say that the service conditions are similar. What is more important, is, whether they discharge similar duties, functions and responsibilities. There is no material to show that the duties, functions and responsibilities of both the categories of lecturers are identical or similar. Though the Equal Remuneration Act, 1976 is mainly directed against discrimination against workmen and is not applicable to respondents or establishments to which they belong, yet relevance of the said definition cannot be denied. It is an enactment made to give statutory shape to the rule of "equal pay for equal work" both for men and women. The Equal Remuneration Act lays stress upon the similarity of the skill, effort and responsibility when performed under similar conditions. Therefore the Equal Remuneration Act would not apply to the respondents.

In *State of West Bengal & others* v. *Madan Mohan Sen & others*,[2] the question was whether "Agragamies" in West Bengal Civil Emergency Force were entitled to be placed in the scale on par with Firemen in the West Bengal Fire Service. It was held by the Supreme Court that the Firemen and leaders are a specialised fire fighting force, while agragamies are, jack of all trades, having been given elementary training in various fields. When called upon to assist, Agragamies assist fire fighting personnel including firemen and leaders just as they assist personnel of other departments. It is idle to contend that they perform the same duties and functions as Firemen and leaders. They assist not only the Fire Service Department but also Police, Municipal, Medical, Health, Social Service Department and so on and so forth. Merely because academic qualifications and physical requirements of both are similar, it cannot be said that they perform similar duties, functions and responsibilities as firemen/leaders. Therefore same pay scale cannot be granted to them.

(i) "worker" means a worker in any establishment or employment in respect of which this Act has come into force.

(j) words and expressions used in this Act and not defined but defined in the Industrial Disputes Act, 1947 (14 of 1947), shall have the meaning respectively assigned to them in that Act.

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1. (1993) 1 LLJ 490 (SC).
2. (1993) 2 LLJ 494 (SC).

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3. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service, whether made before or after the commencement of this Act, or in any instrument having effect under any law for the time being in force.

In *M/s. Mackinon Mackenzie & Co. Ltd.* v. *Andrey D'Costa & another*,[1] it was urged on behalf of the management that the difference between the remuneration of male stenographers and confidential lady stenographers was on account of a settlement arrived at after proper negotiation. It was held that in view of Section 3 of the Act the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement or contract of service whether made before or after the commencement of the Act, or in any instrument having effect under any law for the time being in force. Therefore the settlement must yield to the provisions of the Act.

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1. (1987) 1 LLJ 536 (SC).

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CHAPTER II
PAYMENT OF REMUNERATION AT EQUAL RATES TO MEN AND WOMEN WORKERS AND OTHER MATTERS

4. Duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature:—(1) No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature.

(2) No employer shall, for the purpose of complying with the provisions of sub-section (1), reduce the rate of remuneration of any worker.

(3) Where, in an establishment or employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the same work or work of a similar nature are different only on the ground of sex then the higher (in cases where there are only two rates), or as the case may be, the highest (in cases where there are more than two rates), of such rates shall be the rate at which remuneration shall be payable, on and from such commencement, to such men and women workers :

Provided that nothing in this sub-section shall be deemed to entitle a worker to the revision of the rate of remuneration payable to him or her with reference to the service rendered by him or her before the commencement of this Act.

In *M/s. Mackinnon Mackenzie and Co. Ltd.* v. *Andrey D'Costa and another*[1] a female confidential stenographer after the termination of her services filed a petition under sub-section (1) of Section 7 of the Equal Remuneration Act, 1976 complaining that during the period of her service she was paid remuneration at lesser rates than those of male stenographers who were also performing same or similar work. It was held that in order to get relief under Section 4 of the Act the employee should establish that the remuneration paid by the employer, whether payable in cash or kind, is being paid at rates less favourable than those at which remuneration is paid by him to the employees of the opposite sex in such establishment for performing same work or work of a similar nature. Whether the work is similar in nature as another work can be determined on three considerations. First, the Authority should take a broad view as also a broad approach should be adopted in ascertaining whether any differences are of a practical nature. Secondly, actual duties performed should be looked at and not those theoretically possible. In making comparison the Authority should look at the duties generally performed by men and women. Thirdly, where both men and women work at inconvenient times there is no requirement that all those who work at night shall be paid the same basic rate as those who work during normal day shifts.

It was further held that it may be that the management was not employing any male as confidential stenographer attached to the senior Executives in the establishment and that there was no transfer of confidential lady stenographers to the general pool of stenographers where males were working. It, however, ought not to make any difference for purpose of application of the Act when once it is established that the lady stenographers were doing practically, the same kind of work which the male

1. (1987) 1 LLJ 536. (SC).

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stenographers were discharging.[1]

It was also held that the Act does not permit the Management to pay to a section of its employees doing the same work or work of a similar nature lesser pay contrary to Section 4(1) of the Act because of its financial position which does not permit payment of equal remuneration to all. The applicability of the Act does not depend upon the financial ability of Management to pay equal remuneration as provided by the Act.[2]

5. No discrimination to be made while recruiting men and women workers.—On and from the commencement of this Act, no employer shall, while making recruitment for the same work or work of a similar nature, or in any condition of service subsequent to recruitment such as promotions, training or transfer, make any discrimination against women except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force :

Provided that the provisions of this section shall not effect any priority or reservation for Scheduled Castes or Scheduled Tribes, ex-servicemen, retrenched employees or any other class or category of persons in the matter of recruitment to the posts in an establishment or employment.

6. Advisory Committee.—(1) For the purpose of providing increasing employment opportunities for women the appropriate Government shall constitute one or more Advisory Committees to advise it with regard to the extent to which women may be employed in such establishments or employments as the Central Government may, by notification, specify in this behalf.

(2) Every Advisory Committee shall consist of not less than ten persons to be nominated by the appropriate Government, of which one-half shall be women.

(3) In tendering its advice, the Advisory Committee shall have regard to the number of women employed in the concerned establishment or employment, the nature of work, hours of work, suitability of women for employment, as the case may be, the need for providing increasing employment opportunities for women, including part-time employment, and such relevant factors as the Committee may think fit.

(4) The Advisory Committee shall regulate its own procedure.

(5) The appropriate Government may, after considering the advice tendered to it by the Advisory Committee and after giving to the persons concerned in the establishment or employment an opportunity to make representations, issue such directions in respect of employment of women workers, as the appropriate Government may think fit.

7. Power of appropriate Government to appoint authorities for hearing and deciding claims and complaints.—(1) The appropriate Government may, by notification, appoint such officers, not below the rank of a Labour Officer, as it thinks fit to be the authorities for the purpose of hearing and deciding—

(a) complaints with regard to the contravention of any provision of this Act ;

(b) claims arising out of non-payment of wages at equal rates to men and women workers for the same work or work of a similar nature,

and may, by the same or subsequent notification, define the local limits within which each such authority shall exercise its jurisdiction.

(2) Every complaint or claim referred to in sub-section (1) shall be made in such manner as may be prescribed.

(3) If any question arises as to whether two or more works are of the same nature or of a similar nature, it shall be decided by the authority appointed under sub-section (1).

1. *Mackinnon Mackenzie & Co. Ltd.* v. *Andrey D'Costa and another*, (1987) 1 LLJ 536 (SC).
2. *Ibid.*

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(4) Where a complaint or claim is made to the authority appointed under sub-section (1), it may, after giving the applicant and the employer an opportunity of being heard and after such inquiry as it may consider necessary, direct,—

(i) in the case of a claim arising out of non-payment of wages at equal rates to men and women workers for the same work or work of a similar nature, that payment be made to the worker of the amount by which the wages payable to him exceed the amount actually paid ;

(ii) in the case of complaint, that adequate steps be taken by the employer so as to ensure that there is no contravention of any provision of this Act.

(5) Every authority appointed under sub-section (1) shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) Any employer or worker aggrieved by any order made by an authority appointed under sub-section (1), on a complaint or claim may, within thirty days, from the date of the order, prefer an appeal to such authority as the appropriate Government may, by notification, specify in this behalf, and that authority may, after hearing the appeal, confirm, modify or reverse the order appealed against and no further appeal shall lie against the order made by such authority.

(7) The authority referred to in sub-section (6) may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the period specified in sub-section (6), allow the appeal to be preferred within a further period of thirty days but not thereafter.

(8) The provisions of sub-section (1) of section 33-C of the Industrial Disputes Act, 1947 (14 of 1947), shall apply for the recovery of monies due from an employer arising out of the decision of an authority appointed under this section.

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CHAPTER III
MISCELLANEOUS

8. Duty of employers to maintain registers.—On and from the commencement of this Act, every employer shall maintain such registers and other documents in relation to the workers employed by him as may be prescribed.

9. Inspectors.—(1) The appropriate Government may, by notification, appoint such persons as it may think fit to be Inspectors for the purpose of making an investigation as to whether the provisions of this Act, or the rules made thereunder are being complied with by employers, and may define the local limits within which an Inspector may make, such investigation.

(2) Every Inspector shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

(3) An Inspector may, at any place within the local limits of his jurisdiction,—

(a) enter, at any reasonable time with such assistance as he thinks fit, any building, factory, premises or vessel ;

(b) require any employer to produce any register, muster-roll or other documents relating to the employment of workers, and examine such documents ;

(c) take, on the spot or otherwise, the evidence of any person for the purpose of ascertaining whether the provisions of this Act are being, or have been, complied with ;

(d) examine the employer, his agent or servant or any other person found in charge of the establishment or any premises connected therewith or any person whom the Inspector has reasonable cause to believe to be, or to have been a worker in the establishment ;

(e) make copies, or take extracts from, any register or other document maintained in relation to the establishment under this Act.

(4) Any person required by an Inspector to produce any register or other document or to give any information shall comply with such requisition.

10. Penalties.—(1) If after the commencement of this Act, any employer, being required by or under the Act, so to do—

(a) omits or fails to maintain any register or other document in relation to workers employed by him, or

(b) omits or fails to produce any register, muster-roll or other document relating to the employment of workers, or

(c) omits or refuses to give any evidence or prevents his agent, servant, or any other person in charge of the establishment, or any worker from giving evidence, or

(d) omits or refuses to give any information,

he shall be punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to ten thousand rupees or with both.

(2) If, after the commencement of this Act, any employer—

(a) makes any recruitment in contravention of the provisions of this Act, or

(b) makes any payment of remuneration at unequal rates to men and women workers, for the same work or work of a similar nature, or

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(c) makes any discrimination between men and women workers in contravention of the provisions of this Act, or

(d) omits or fails to carry out any direction made by the appropriate Government under sub-section (5) of section 6,

he shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with imprisonment for a term which shall not be less than three months but which may extend to one year or with both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.

(3) If any person being required so to do, omits or refuses to produce to an Inspector any register or other document or to give any information, he shall be punishable with fine which may extend to five hundred rupees.

11. Offences by companies.—(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director or manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation—For the purposes of this section,—

(a) "Company" means any body corporate and includes a firm or other association of individuals ; and

(b) "director", in relation to a firm, means a partner in the firm.

12. Cognizance and trial of offences.—(1) No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(2) No court shall take cognizance of an offence punishable under this Act except upon—

(a) its own knowledge or upon a complaint made by the appropriate Government or an officer authorised by it in this behalf, or

(b) a complaint made by the person aggrieved by the offence or by any recognised welfare institution or organisation.

Explanation—For the purposes of this sub-section "recognised welfare institution or organisation" means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

13. Power to make rules.—(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the manner in which complaint or claim referred to in sub-section (1) of section 7 shall be made ;

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(b) registers and other documents which an employer is required under section 8 to maintain in relation to the workers employed by him ;

(c) any other matter which is required to be, or may be, prescribed.

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect as the case may be ; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

14. Power of Central Government to give directions.—The Central Government may give directions to a State Government as to the carrying into execution of this Act in the State.

15. Act not to apply in certain special cases.—Nothing in this Act shall apply—

(a) to cases affecting the terms and conditions of a woman's employment in complying with the requirements of any law giving special treatment to women, or

(b) to any special treatment accorded to women in connection with—

(i) the birth or expected birth of a child, or

(ii) the terms and conditions relating to retirement, marriage or death or to any provision made in connection with the retirement, marriage or death.

16. Power to make declaration.—Where the appropriate Government is, on a consideration of all the circumstances of the case, satisfied that the differences in regard to the remuneration, or a particular species of remuneration, of men and women workers in any establishment or employment is based on a factor other than sex, it may, by notification, make a declaration to that effect, and any act of the employer attributable to such a difference shall not be deemed to be a contravention of any provision of this Act.

17. Power to remove difficulties.—If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by notification, make any order, not inconsistent with the provisions of this Act, which appears to it to be necessary for the purpose of removing the difficulty :

Provided that every such order shall, as soon as may be after it is made, be laid before each House of Parliament.

18. Repeal and saving.—(1) The Equal Remuneration Ordinance, 1975 (12 of 1975) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Ordinance so repealed (including any notification, nomination, appointment order or direction made thereunder) shall be deemed to have been done or taken under the corresponding provisions of this Act as if this Act were in force when such thing was done or action was taken.

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"Life is an imitation of Art ....
and art is an imitation of
reality .... ;
therefore, Life is but an
imitation of Reality."

The Reality of Dreams.

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